Supreme Court of the United States

OCTOBER TERM, 1946

No. 344

HORACE A. HILDRETH, GOVERNOR OF THE STATE OF MAINE, CHARLES M. DALE, GOVERNOR OF THE STATE OF NEW HAMPSHIRE, ET. AL.,
Appellants.

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

BRIEF ON BEHALF OF APPELLANTS

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BRIEF ON BEHALF OF APPELLANTS

OPINION OF THE COURT BELOW

The opinion of the Court below is reported at 65 Federal Supplement 856.

STATEMENT AS TO JURISDICTION

The above-entitled proceeding is an appeal from the final decree and order of the District Court of the United States for the Northern District of New York in two proceedings brought to enjoin, set aside and annul a certain order of the Interstate Commerce Commission. Section 210 of the Judicial Code (U.S.C., Title 28, Section 47a) confers jurisdiction upon this Court to review final judgments or decrees of District Courts in such cases upon direct appeal.

STATEMENT OF THE CASE

In this proceeding this Court is asked to review the final decree and order of the District Court of the United States for the Northern District of New York, entered May 27, 1946 and entitled—Final Decree and Order Continuing Interlocutory Injunction—which decree and order dismissed petitions filed in two proceedings before said District Court (a) by the States of New York, Delaware, Indiana, Maryland, Michigan, New Jersey, Ohio and Wisconsin and the Commonwealth of Pennsylvania (hereinafter called the Northern States) and (b) by The Atchison, Topeka & Santa Fe Railway Co. and thirty-one other Western railroad companies (hereinafter called the Western railroads) respectively, asking that a certain report and order of the Interstate Commerce Commission (hereinafter called the Commission) be permanently enjoined, set aside, and forever annulled. While the District Court granted an interlocutory injunction forbidding enforcement of the Commission's order during the pendency of the proceedings in the District Court, and while it has continued that interlocutory injunction pending the final determination of the issues by this Court, it has declined to enter an order permanently enjoining enforcement of the Commission's order.

Appellants in this proceeding (Case No. 344) participated in the proceedings before the District Court as plaintiffs-interveners, and their appeal to this Court from said final decree and order was allowed on June 25, 1946, concurrently with the appeals of the Northern States and the Western railroads, appellants in Cases numbered 343 and 345. (R. 1465, 1474, 1483) The three proceedings have now been consolidated for hearing, and a single record has been printed.

The report and order of the Commission which appellants* sought to have enjoined, set aside and annulled by the District Court are the report and order of the Commission dated May 15, 1945 and, as amended, October 30, 1945, in two investigation proceedings—*Class Rate Investigation, 1939* (Docket No. 28300)—and—*Consolidated Freight Classification* (Docket No. 28310). The Commission's report and supplemental report (modifying its original report) are reported officially at 262 I.C.C. 447, and 264 I.C.C. 41 respectively and appear at pages 62 to 381 and 432 to 483 of the record herein.

The Commission has found, in its report, that railroad class rates must, as a matter of law, be made uniform throughout all that portion of the United States which lies east of the Rocky Mountains and that, notwithstanding the very widespread and substantial differences in transportation conditions which prevail throughout the area, such railroad class rates will be lawful in the future only if they are uniform. The Commission's order requires the railroads to take steps toward achieving such uniformity by increasing all class rates in the Northeastern portion of the United States by 10% and reducing all class rates in the South and West (as well as all class rates between regions) by 10%. (R. 384-5) Appellants have attacked the Commission's report and order as based upon an erroneous theory as to the law, as not supported by the Commission's subsidiary findings of fact or by the evidence and as inconsistent with, and wholly improper in view of the subsidiary findings of fact which the record required and the Commission itself made.

Preliminary factual matters, the understanding of which is essential to an understanding of the issues herein, include a description of class rates, of the extent to which

* Unless otherwise is indicated references in this brief to appellants include appellants in cases numbered 343 and 345, which are to be heard with this proceeding.

class rates are now uniform, of the relationship between class rates and other types of rates, and of the relative levels of class rates and of all rates applicable east of the Rocky Mountains. These matters will be considered at the outset.

CLASS RATES

The class rate method of rate publication, which was devised as a means of publishing rates for all commodities for all distances in relatively compact form entails two procedures—(a) the preparation of a freight classification, which assigns the articles of freight, for which rates are to be published, into classes, grouping in the same class, in so far as possible, all articles of freight having similar transportation characteristics, and (b) the establishment of a distance or mileage scale of rates for one of those classes. A form of mileage scale appears as Appendix 10 to the report of the Commission (Rep. 766; R. 381).* All articles of freight assigned to the class for which the mileage scale is established (which is invariably first class or Class 100) are charged the rates set forth in the scale. Rates for all other classes are either fixed percentages or fixed multiples of the first class or scale rates. A shipper who wishes to know the class rate for transporting his particular goods a given distance, 200 miles for example, need only consult the freight classification tariff, to find the class to which his commodity is assigned, and then the distance scale to find his actual class rate. Thus, if the article is assigned to first class, the shipper's rate is the full scale rate, which for 200 miles might be 80¢ per 100 lbs. If the article were assigned to fourth class in official territory (which is charged only 50% of the first class rate) the shipper's rate

* For the convenience of the Court, each reference to the Commission's decision will include a reference to the page of its decision as reported in 262 I.C.C. (preceded by the abbreviation—Rep.—) or its supplemental report in 264 I.C.C. (preceded by the abbreviation—Supp. Rep.)

would, of course, be only 40¢. Virtually all articles of commerce are included in the more than 20,000 items listed in the railroads' present freight classification tariff, and therefore have published class rates.

These class rates may be and commonly are superseded by lower rates of other types (as is hereinafter pointed out).

THE EXTENT OF PRESENT CLASS RATE UNIFORMITY

Class rates are, for the most part, and at the present time, uniform within two of the three well-defined broad areas of the country, which are known as territories for railroad rate-making purposes, and within each of the three zones of the third broad area.

These territories are—(1) Official Classification Territory (or Official Territory) comprising generally that part of the United States which lies east of the Mississippi River and north of the Ohio and Potomac Rivers, and including the six New England States; (2) Southern Classification Territory (or Southern Territory) comprising that part of the United States lying east of the Mississippi River and south of the Ohio and Potomac Rivers and (3) Western Classification Territory (or Western Territory) comprising that part of the United States lying west of the Mississippi River.* Western Territory, as so defined, of course, includes the southwestern part of the United States, which is sometimes separately designated as Southwestern Territory.

* The line separating Official and Western Territories follows the Mississippi River north as far as the southwestern corner of Wisconsin, from which point it crosses the State of Wisconsin diagonally to Milwaukee, Wisconsin and thereafter follows, northerly, the western shore of Lake Michigan. (Rep. 457, R. 72). Actually, therefore, all of Minnesota, a large part of Wisconsin and the Upper Peninsula of Michigan are in Western Territory. Other than in this one respect, the areas comprising the three territories are substantially as stated.

Insofar as freight classification is concerned, complete uniformity exists territorially. Thus, the railroads in Official Territory publish and maintain a single freight classification for uniform application throughout Official Territory. The carriers in Southern Territory and Western Territory, respectively, maintain separate classifications which apply uniformly throughout their respective territories. (Rep. 457, R. 72) For purposes of convenience of shippers and carriers, the three classifications are combined in one volume, which is known as the Consolidated Freight Classification. (R. 4, 823)

Class rate uniformity does not cross territorial boundaries at the present time, and substantial differences exist as between class rates in one territory and class rates in another territory. Such differences result in part from differences in freight classification but principally because the applicable mileage scale rates are so substantially different. (Rep. 744, R. 359)

So also, interterritorial class rates applicable to the movement of class-rate traffic between territories differ from the intraterritorial class rates applicable to movement within any particular territory. The former are governed, as to classification, by either the classification of the origin territory or that of the destination territory (and the railroads' tariffs indicate the governing classification) and, as to rates, generally speaking, by formulae which the carriers have devised, or which the Commission has prescribed, which blend the distance scales of the territories through which the traffic moves. (Rep. 476, R. 91; Rep. 526-36, R. 141-151)

Economic considerations arising out of the manner in which the nation's rail transportation system has developed explain fully the fact of general uniformity of class rates within each of the major rate territories and general nonuniformity of class rates on any broader basis. The railroads of this country developed, expanded and now operate within regional lines which conform closely to present

territorial boundaries. (R. 3621-23) Thus, the northern railroads, in the course of their development, frequently extended their lines to, but seldom below, the Ohio or Potomac Rivers, and the southern railroads were seldom extended northward across these rivers. Very few railroads in either area extended their lines further west than, at most, west bank crossing points on the Mississippi River. Western railroad development, on the other hand, was concentrated west of the Mississippi River. This same regionalization of development characterized the period of raiload mergers and consolidations. The great system lines carriers which emerged from that period emerged and now operate, not as transcontinental railroads, and rarely as interregional railroads, but in virtually all cases as extensive systems in and throughout either the North, the South or the West. Generally speaking, the most extended lines of each of these systems reach to, but not beyond, the major geographic barriers which are now recognized as territorial boundaries. (R. 3622)

Because the railroads have developed and now operate along the regional lines referred to, it is feasible for them now to maintain substantial regional uniformity of rates in Official and Southern Territories, and uniformity throughout extensive zones in Western Territory. Railroads, like other business enterprises, are required, in fixing their charges, to take primarily into account the conditions which prevail in the areas in which they operate. If the carrier's territory of operation is wide and extensive so that varying conditions are encountered, the carrier's rates may, of course, be so made as to meet the average of these conditions. But whatever the area of operations, if the conditions prevalent in that area are not observed, the carriers' rates will be either too low to produce adequate revenues or too high to permit the free flow of traffic by rail. At the outset, and prior to the period of expansion and merger, this practical necessity of relating railroad rates to con-

ditions experienced in operations led to many and wide divergencies between rates in the various sections of the country, as the different carriers sought to reflect, in their rates, the widely differing conditions which they encountered in their own limited operations. (R. 3621) Later, as the large system railroads developed, and commenced operating throughout the wide areas which are now called territories, it became feasible for these carriers to take account of the average of all conditions affecting transportation in their territory and to publish rates based thereon which would be uniform throughout the territory. (R. 3622)

Uniformity of rates on any broader basis than the territorial basis, however, has not been achieved, due to the circumstance that conditions in the different rate territories vary, and that no carrier or group of carriers is in a position to average out such differences. (R. 3623) The Commission recognized this when it prescribed the class rates which it now finds unlawful (Rep. 516-7; R. 131-2) and as the late Commissioner Porter pointed out in his dissenting opinion to the Commission's report:

> "Throughout the history of its regulation, the Commission has consistently recognized what is still the fact, namely, that conditions in the various rate territories differ with respect to the volume and kind of traffic transported, the distribution of the rate burden, and the revenue needs of the railroads. These and other factors have resulted in the maintenance of different rate territories, the boundaries of which have been determined largely by the basic fact that, in general, the rails of the carriers within the respective territories do not extend beyond their borders, and in the establishment of different rate levels within those territories." (Rep. 712, R. 327)

THE RELATIONSHIP BETWEEN CLASS RATES AND OTHER TYPES OF RAILROAD RATES

In addition to class rates, the railroads publish exception rates and commodity rates, both of which, generally speaking, are lower than class rates, and both of which move substantially greater volumes of traffic than class rates. Exceptions and commodity rates are special "reduced" rates which the railroads establish, sometimes over a wide area, and at other times within a very limited area, in order to attract traffic or to hold traffic which would use other types of transportation rather than pay the class rates. Thus, exception and commodity rates are established where the volume of traffic is unusually heavy (as for example in the case of automobiles from Detroit), where motor truck or water competition is a transportation factor, and where required to enable shippers to meet the competition of other manufacturers in remote markets.

Exception rates are very similar to class rates and are almost always upon the same mileage scales as the class rates. (Rep. 549, R. 164). They are called exception rates because they result from the railroad's creating exceptions to the standard or regular classification. Thus, an article regularly assigned to first class may, by the publication of a so-called exception tariff, be assigned to third class in a certain area, or between two points, or in one direction between those two points. Wherever the exception applies, of course, the higher class rate is superseded and becomes a mere "paper" rate.

Commodity rates follow no single specific pattern. They are, essentially, specific rates for particular hauls on individual commodities. Some commodity rates apply only in one direction between two points ten miles apart. Others apply to all movements of the particular commodity within a territory and are based upon mileage scales, either the class rate scale or a special commodity scale. Commodity

rates, like exception rates, to the extent applicable, generally supersede and are lower than the regular class rates, the latter becoming merely paper rates. (Rep. 476, R. 91) The only commodity rates which move substantial amounts of traffic and yet do not supersede regular class rates are commodity rates which are published for the relatively few articles which are not listed in the Consolidated Freight Classification and which, therefore, do not have regular published class rates.

In all territories, the great majority of the traffic (both intraterritorial and interterritorial) moves on commodity rates. Exception rates move the next largest volume of traffic and class rates the least. (Rep. 479, R. 94) In Official Territory, approximately 5.8% of the total carload traffic moves on class rates; in the South and West the percentages are only 1.8 and .6, respectively.

The Commission's investigation did not formally extend to exception and commodity rates, and its order does not apply to them.

RELATIVE LEVELS OF CLASS RATES AND OF ALL RATES

Class rates are generally lower, mile for mile, in Official Territory than in either Southern or Western Territories, although it is impossible to determine and state accurately the exact difference in levels. For example, for certain distances, the Official Territory mileage scale rates are approximately 30% higher than the Southern Territory scale rates, but for other distances, the difference may be either greater or less. (Rep. 475, R. 90) So also, it is necessary to take into account the effect of classification differences, for the assignment of particular commodities to lower classifications in the South or West than the same commodities enjoy in Official Territory necessarily reduces and may eliminate the rate difference indicated by a comparison merely of the distance scales. (Rep. 474, R. 89)

Because interterritorial class rates reflect, generally, a blending of the class rate levels of more than one territory, these rates between Official Territory and other territories are generally somewhat higher than Official Territory intraterritorial class rates and somewhat lower than intraterritorial rates in the other territories. (Rep. 476, R. 91)

While class rates are thus generally somewhat lower in Official Territory and to and from Official Territory than in either the South or the West, it cannot seriously be disputed that both the South and West have the benefit of unusually favorable exception rates and commodity rates. While the Commission's investigation did not comprehend exception and commodity rates as such and while the record is not complete as to specific rates in these categories, both the record and the Commission's report afford ample indication that the exception and commodity rates in the South, at least, are commonly lower than such rates in Official Territory. Thus, the Commission itself recognized in its report (Rep. 593, R. 208) that in many instances commodity rates are lower in the South than the rates applicable to the same articles in Official Territories. It then proceeds to consider in detail certain types of traffic for which commodity rates in the South are lower, and substantially lower. These commodities include brick, fertilizer, and fertilizer materials, coke, lime, logs, lumber, pig iron, pulpwood, sand, gravel, crushed stone, slag, iron or steel scrap, sulphuric acid, and iron ore—commodities which move in very heavy volume in the South.

The record discloses and the Commission has found that the level of all rates in the South exceeds the level of all rates in Official Territory by only about 4%. (Rep. 606, R. 221)

THE COMMISSION'S REPORT AND ORDER

The order of the Commission which appellants sought to have enjoined and set aside by the District Court was entered at the conclusion of the Commission's investiga-

tion proceedings, hereinbefore referred to, and was an ad interim order so-called. Its purpose was to accomplish and achieve temporarily a portion of the results which the findings in its report indicate to be the Commission's ultimate goal—namely, uniformity of all classification ratings and class rates throughout the nation. Said order directed the railroads serving in Official Territory to increase forthwith by 10% (from their then level) all class rates applicable within Official Territory; directed all railroads serving in Southern and Western Territories to decrease forthwith by 10% (from their then level) all class rates applicable within those respective territories (except rates applicable in Western Territory west of the Rocky Mountains), and directed all railroads participating in transportation between the various territories to decrease forthwith by 10% (from their then level) all class rates applicable to such interterritorial movement. (R. 385)

While the Commission entered no order requiring railroad action with respect to the unification of classification ratings, it indicated an intention to do so if the railroads should fail to undertake such action voluntarily. The Commission's action in this respect explains in part its ad interim order, and it is therefore essential to consider the Commission's ultimate findings with respect to both classifications and class rates.

The Commission's ultimate findings with respect to the Consolidated Freight Classification were that the present classifications, to the extent they are not uniform, are unlawful in violation of Sections 1 and 3 of the Act; that it would be feasible for the railroads to establish a uniform classification, and that such a uniform classification would be just and reasonable. The railroads were thereupon "given reasonable opportunity to initiate such uniform classification by their own collective action before we undertake the task." (Rep. 511, R. 126)

The Commission's ultimate findings with respect to class rates were that all such class rates, intraterritorial and

interterritorial, east of the Rocky Mountains were unjust and unreasonable in violation of Section 1 of the Act, and that the relationship between the Official Territory rates, on the one hand, and the interterritorial rates applicable to Official Territory from each of the other territories, on the other hand, was unlawful in violation of Section 3 of the Act.

Numerous parties to the proceedings before the Commission (including appellants in this proceeding) filed petitions requesting rehearing, reargument and/or reconsideration by the Commission of its report and order. These petitions were, except as to formal matters, denied by the Commission by its order dated October 30, 1945. (R. 482-3)

THE ACTION OF THE DISTRICT COURT

Following the refusal of the Commission to reconsider its ad interim order, the appellants, Northern States and Western railroads, filed with the District Court their petitions for an order enjoining, setting aside and annulling the order of the Commission.

The District Court, at appellants' request and after hearing and notice, entered an interlocutory injunction on December 20, 1945 staying enforcement of the Commission's order pending further order of the Court. (R. 805)

On May 9, 1946, the District Court announced its decision that the petitions should be dismissed. (R. 1411) Appellants moved for continuance of the interlocutory injunction pending final determination of their appeals to this Court, (R. 1441, 1445, 1449) and these motions were allowed, the District Court concluding as a matter of law:

> "1. The decision of these consolidated causes necessarily involves the determination of novel questions of law of great importance to the shippers, the carriers, and the public of this country. There are reasonable and serious doubts as to the determination of these novel and important questions.

2. Considering the reasonable doubts as to the validity of the orders of the Interstate Commerce Commission herein, the novel character of the questions of law to be determined, the fact that the present class rates were established by the Interstate Commerce Commission itself and have been in effect for many years, and considering the equities of the shippers, the carriers, and the public, the Court in its discretion should continue the interlocutory injunction pending the perfecting and final determination of any and all appeals from the final order of the Court herein." (R. 1452)

The final decree and order of the District Court was entered on May 27, 1946, and appellants' appeals to this Court were allowed by said District Court on June 25, 1946. (R. 1465, 1474, 1483)

FURTHER ACTION OF THE COMMISSION DURING THE PENDENCY OF THESE APPEALS

Since the docketing of the appeals in this proceeding, the Commission has issued a final report and order in proceedings entitled—*Increased Railway Rates, Fares and Charges,* 1946—and—*Increased Railway Rates, Fares and Charges,* 1942 (numbered 162 and 148, respectively, in the Ex Parte dockets of the Commission), authorizing certain general freight rate increases throughout the United States, including increases of 25% in Official Territory intraterritorial class rates, increases of 20% in class rates within the South and West and of 22½% in class rates applying between points in Official Territory and points outside thereof. A copy of the order of the Commission in said proceeding and of the Commission's ultimate findings and conclusions as set forth in its report therein appear in the Appendix hereto.

In so far as intraterritorial class rates within the South and West and all interterritorial class rates are concerned,

of course, the 1945 orders of the Commission (requiring 10% reduction in said rates from the 1945 level in effect when the orders were made) are completely inconsistent with the Commission's 1946 order authorizing 20% and 22½% increases in those same rates. Thus, whereas the Commission found in the Class Rate Investigation proceeding (the subject matter of this appeal) that all Southern, Western and interterritorial class rates were *unreasonably high* and would be unlawful *unless reduced 10% below their May 15, 1945 level,* the Commission has now found, in the general increase proceeding (hereinafter referred to as Ex Parte 162) that these same rates which it had previously ordered reduced may now lawfully and properly *be increased by 20%* (and 22½% interterritorially between Official Territory and other territories) over the level at which such rates were maintained on May 15, 1945.

The situation with respect to the Official Territory rates is just as confusing. The Commission has now authorized increases of 25% in Official Territory class rates. It had previously *ordered* increases of 10%, but such ordered increases had been stayed by order of the District Court. It would appear from the report of the Commission in Ex Parte 162 that, if the Commission's 1945 order requiring 10% higher class rates in Official Territory were now to become effective, the Commission's subsequent 25% permissive increase would become applicable to the rates as so increased by 10%. If this interpretation be correct, the railroads would be required to maintain Official Territory class rates at not less than 110% of their May 15, 1945 levels and would be permitted to maintain rates 25% higher than such increased rates, or 137½% of their 1945 levels.

SPECIFICATION OF ERRORS

Appellants in this Case No. 344 specify as the assigned errors which they intend to urge, the following errors, being the errors set forth in their Assignment of Errors upon

which this appeal was taken (R. 1468) and adopted as their statement of points to be relied upon in this Court (R. 1521).

1. The District Court erred in dismissing the petitions of the plaintiffs in said proceedings.

2. The District Court erred in ruling that the ad interim order of the Interstate Commerce Commission (hereinafter called the Commission) entered May 15, 1945, as amended by the order of the Commission entered October 30, 1945, in the proceeding entitled—*Class Rate Investigation, 1939*—and numbered 28,300 in the dockets of the Commission (said order entered May 15, 1945, as so amended, being hereinafter called the order of the Commission), is lawful and valid.

3. The District Court erred in holding

> "that the Commission correctly decided that the ad interim order under review was within the scope of its statutory power." (P. 27)

4. The District Court erred in failing to rule that the order of the Commission, in so far as it directed an increase in Official Territory intraterritorial class rates, is unlawful and invalid (a) in that such order lacks the support of necessary and adequate preliminary findings of fact, (b) in that the subsidiary findings of fact which the Commission has made are contrary to the ultimate conclusions of the Commission and preclude the making of the preliminary findings of fact which would be necessary to support the order of the Commission, and (c) in that the evidence would not have permitted or supported the making of such necessary and adequate preliminary findings of fact.

5. The District Court erred in ruling implicitly, (a) that the lack of adequate and necessary preliminary findings does not render the order of the Commission invalid, and

(b) that the only test of the validity of said order is whether it is supported by substantial evidence.

6. The District Court erred in finding that the facts found by the Commission are supported by substantial evidence, in adopting such findings of fact as findings of the District Court, and in finding that there was substantial evidence to support such findings as the Commission made.

7. The District Court erred in failing to rule that the order of the Commission, in so far as it directs an increase in Official Territory intraterritorial class rates, which the evidence and the preliminary findings of the Commission show to be profitable, is inconsistent with and violative of Section 15a (2) of the Interstate Commerce Act, which requires the Commission, in determining just and reasonable rates, to give due consideration to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service.

8. The District Court erred in failing to rule that the order of the Commission, in so far as it directs an increase in Official Territory intraterritorial class rates, cannot be sustained as a valid order remedying a Section 1 violation.

9. The District Court erred in ruling that it might not properly set aside an order of the Commission requiring increases in rates which are within the so-called zone of reasonableness between reasonable minimum and reasonable maximum rates.

10. The District Court erred in failing to rule that the Commission's finding that intraterritorial class rates within Official Territory are unjust and unreasonable in violation of Sections 1 (4) and 1 (5) of the Interstate Commerce Act is not a valid and proper finding, but a mere conclusion

which not only is lacking the support of necessary and adequate preliminary findings but is in fact inconsistent with and contrary to the findings which the Commission has made and to the evidence before the Commission.

11. The District Court erred in failing to rule that a finding that rates are unjustly and unreasonably low, in violation of Section 1 of the Act, must, to be valid, be based upon a subsidiary finding, supported by evidence, either that such rates are noncompensatory and so low as to burden other traffic, or that the continuance of such rates will be likely to result in a rate war or otherwise be harmful, from a revenue standpoint, to the carrier publishing the rates or to other and competing carriers.

12. The District Court erred in failing to rule that an order of the Commission, directing increases in rates by reason of a conclusion of a violation of Section 1 of the Act, must be based not only upon a valid finding that such rates are unjustly and unreasonably low but also upon a finding, supported by evidence, that rates lower than the rates required to be established pursuant to the Commission's order either would be noncompensatory and so low as to burden other traffic or would be likely to result in a rate war or otherwise be harmful, from a revenue standpoint, to the carrier publishing the rates or to other and competing carriers.

13. The District Court erred in failing to find that the Commission has not made, and that the evidence would not support any of the preliminary findings of fact required to support a finding that Official Territory intraterritorial class rates are unjustly and unreasonably low in violation of Section 1 of the Act, but that it has, on the contrary, made particular findings of fact which are inconsistent with and contrary to its ultimate finding as aforesaid.

14. The District Court erred in failing to rule that the order of the Commission, in so far as it directs an increase in Official Territory intraterritorial class rates, cannot be sustained as a valid order remedying a Section 3 violation.

15. The District Court erred in failing to rule that the provisions of the Transportation Act of 1940 effect no change in the substantive law with respect to the elements of proof of undue preference and prejudice, and that preliminary findings of fact which were essential to the validity of an ultimate finding of undue preference of and prejudice against an entity entitled to protection against prejudice, prior to the enactment of said 1940 Act, continue to be essential to the validity of such an ultimate finding.

16. The District Court erred in ruling that the absence of the preliminary findings which the Court finds to have been held essential to be proved to establish a basis for findings of preference or prejudice or discrimination as to rates before the 1940 amendment of Section 3(1) of the Act, does not now invalidate a finding of preference and prejudice.

17. The District Court erred in failing to rule that the Commission's finding that Official Territory intraterritorial class rates and class rates into Official Territory from other territories are unduly preferential of Official Territory as a whole and of the shippers and receivers of freight located therein and unduly prejudicial to Southern, Southwestern and Western Territories as a whole and shippers and receivers of freight located therein, in violation of Section 3 of the Act, is not a valid and proper finding, but a mere conclusion which not only is lacking the support of adequate and preliminary findings, but is in fact inconsistent with and contrary to the findings which the Commission has made and is not supported by the evidence.

18. The District Court erred in failing to rule that the order of the Commission is invalid and unlawful, in so far as it rests upon the Commission's ultimate finding of undue preference and prejudice (a) in that such an ultimate finding must be based upon a preliminary finding that the allegedly unlawful rates are charged on the same types of freight or the freight of competing shippers, (b) in that the Commission has not made, and the evidence will not support, such a finding and (c) in that other preliminary findings which the Commission has made preclude the making of such preliminary finding which is necessary to the validity of its ultimate finding and therefore its order.

19. The District Court erred in failing to rule that the order of the Commission is invalid and unlawful, in so far as it rests upon the Commission's ultimate finding of undue preference and prejudice (a) in that such an ultimate finding must be based upon a preliminary finding that injury results or will result to the allegedly prejudiced territories or the shippers and receivers of freight therein, by reason of the continued maintenance of the allegedly unlawful rates, (b) in that the Commission has not made, and the evidence will not support such a finding and (c) in that other preliminary findings which the Commission has made preclude the making of such preliminary finding which is necessary to the validity of its ultimate finding and therefore its order.

20. The District Court erred in failing to rule that the order of the Commission is invalid and unlawful, in so far as it rests upon the Commission's ultimate finding of undue preference and prejudice arising from lack of territorial class rate uniformity (a) in that such an ultimate finding must be based upon a preliminary finding that transportation conditions do not justify any differences between said allegedly unlawful rates, (b) in that the Commission has not made, and the evidence will not support such a finding

and (c) in that other preliminary findings which the Commission has made preclude the making of such preliminary finding which is necessary to the validity of its ultimate finding and therefore its order.

21. The District Court erred in ruling that the Commission's order is not improper and beyond the power and authority of the Commission because of the failure of the order to afford the carriers alternative methods of removing the allegedly found discrimination.

SUMMARY OF ARGUMENT

The order of the District Court dismissing the petitions of the Northern States and the Western railroads for an order permanently enjoining enforcement of the Commission's ad interim order should be reversed and these proceedings should be remanded with instructions to the District Court to enter a permanent injunction.

The Commission's ad interim order has been vitiated by the order which the Commission entered on December 5, 1946 in Ex Parte 162, and this Court should therefore summarily reverse the District Court's order and remand the proceedings with instructions to the District Court to enter a permanent injunction. The reductions in Southern and Western class rates which are required by said ad interim order cannot stand, in view of the Commission's order in Ex Parte 162, and, as the ad interim order is integral, the order, as an entirety, cannot stand.

The ad interim order of the Commission is wholly invalid, even apart from its inconsistency with the Commission's order in Ex Parte 162, and the enforcement of such order should have been enjoined by the District Court. The Commission does not have authority to require changes in established rates unless such rates are unlawful, and no order which it enters requiring such changes is valid unless the ultimate findings of unlawfulness upon which such order

rests are supported by adequate particular findings which are in turn supported by substantial evidence. While the Commission has purported to find Official Territory class rates violative of Section 1 of the Act, and to find the relationship between such rates and inter-territorial rates from other territories to Official Territory violative of Section 3 of the Act, an analysis of the record and of the Commission's report and order shows that the Commission's order cannot be supported as an appropriate correction of either a Section 1 or a Section 3 violation. Thus, while the Commission concluded that Official Territory class rates were less than just and reasonable rates in violation of Section 1, it made no findings which support this conclusion. The record does not permit such findings, and other findings which the Commission has made are inconsistent with and preclude such findings. The same is true with respect to the Commission's conclusions and findings concerning a Section 3 violation. The Commission has misconstrued the 1940 amendment to Section 3(1) of the Act as a Congressional mandate to establish uniformity, or near uniformity, as a new standard of lawfulness, and on that basis the Commission has made an ultimate finding of a Section 3 violation. This ultimate finding, however, when examined in the light of established regulatory principles, is not only wholly unwarranted, but is also inconsistent with and precluded by the Commission's preliminary findings. The Commission's order would be further objectionable as an order to correct a violation of Section 3 (even if such violation could be found to exist) because the order fails to afford the carriers alternative methods of removing the alleged "undue preference and prejudice."

ARGUMENT

Point One

THE COMMISSION'S AD INTERIM ORDER, WHICH THE DISTRICT COURT REFUSED TO ENJOIN, SET ASIDE AND ANNUL, HAS BEEN VITIATED BY THE ORDER WHICH THE COMMISSION ENTERED ON DECEMBER 5, 1946 IN EX PARTE 162, AND THIS COURT SHOULD THEREFORE SUMMARILY REVERSE THE ORDER OF THE DISTRICT COURT AND REMAND THE PROCEEDINGS WITH INSTRUCTIONS TO THE DISTRICT COURT TO ISSUE A PERMANENT INJUNCTION.

The Commission's ad interim order, which appellants sought to have the District Court enjoin, is obviously an integral order. Said order concerns the relationship between class rates in Official Territory and all other class rates, and, if permitted to become effective, would alter the relationship by altering all such class rates. Any order which is concerned with the relationship of rates is necessarily integral. When the order itself directly affects all of the rates which create the relationship the integral character of the order is obvious.

The Commission's ad interim order in the Class Rate Investigation proceeding, in so far as it ordered reductions in Southern and Western class rates, can no longer stand. In the Class Rate Investigation proceeding, the Commission found that maximum reasonable class rates in the South and West were ten percent lower than the rates then in effect, namely, the rates of May 15, 1945, and ordered that the rates be reduced to maximum reasonable rates. as so found. In Ex Parte 162, decided December 5, 1946, the Commission concluded that maximum reasonable class rates in the South and West were 20% higher than the class rates in effect on May 15, 1945. It is obvious that an order cannot now be sustained which, for example, directs a reduction in a 100¢ rate to 90¢ on the ground that 90¢ is the maximum reasonable rate, when the Commission has subse-

quently made clear that a rate substantially in excess of 100% is the maximum reasonable rate. So far as the ordered reduction rests on a finding of a Section 1 violation (namely, maintenance of rates in excess of reasonable maxima) the subsequent finding in Ex Parte 162 shows that the first finding no longer may be relied upon. The ordered reduction cannot rest on a finding of a Section 3 violation because *neither Western nor Southern class rates have been found to be prejudicial.* Moreover, in so far as the order in the Class Rate Investigation proceedings seeks to correct any preference and prejudice, it starts a change in relationship on the assumption of its finding (no longer acceptable) that maximum reasonable class rates in the South and West are rates 10% lower than those in effect on May 15, 1945. *Inasmuch as the ordered reduction in Southern and Western class rates was premised exclusively on a finding that those rates exceeded maximum reasonable class rates by 10%, it now being apparent from the Commission's subsequent action that those rates are in fact materially less than maximum reasonable class rates, the ordered reduction cannot stand and as the order is integral, the order as an entirety cannot stand.*

This Court clearly has the power to consider the effect of the Commission's action in Ex Parte 162, and, on the basis thereof, to enter a summary order reversing the final order of the District Court and directing said Court to enter the permanent injunction which the Northern States and Western railroads originally requested. As Mr. Justice Brandeis said, speaking for the Court in *Watts, Watts & Co., Ltd.* v. *Unione Austriaca Di Navigazione,* 248 U. S. 9, 21 (1918):

> "This Court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. *Butler* v. *Eaton,* 141 U. S. 240; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis,* 224 U. S. 503, 506. And in determining

what justice now requires the court must consider the changes in fact and in law which have supervened since the decree was entered below. *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475, 498; *Berry* v. *Davis*, 242 U. S. 468; *Crozier* v. *Krupp*, 224 U. S. 290, 302; *Jones* v. *Montague*, 194 U. S. 147; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115, 120; *Mills* v. *Green*, 159 U. S. 651; *The Schooner Rachel* v. *United States*, 6 Cranch 329; *United States* v. *The Schooner Peggy*, 1 Cranch 103, 109-110."

and see also:

Patterson v. *Alabama*, 294 U. S. 600, 607 (1934)

Villa et al v. *Van Schaick*, 299 U. S. 152, 155 (1936)

That supervening decisions and orders of the Interstate Commerce Commission fall within the purview of Mr. Justice Brandeis' remarks, is clear from the decision of this Court in *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 79 (1942). Moreover, where, as in this case, it is clear that the change in circumstances is controlling and that further proceedings below would be of no avail, this Court has reversed the judgments below and remanded the cases to the lower court with directions to enter judgment for the party entitled thereto.

Butler v. *Eaton*, 141 U.S. 240, 243-4 (1890),

and see

Ballard v. *Searls*, 130 U. S. 50 (1889)

Point Two

THE AD INTERIM ORDER OF THE COMMISSION REQUIRING A 10% INCREASE IN OFFICIAL TERRITORY CLASS RATES IS INVALID, AND THE DISTRICT COURT ERRED IN REFUSING TO ENTER AN ORDER ENJOINING, SETTING ASIDE, AND ANNULLING SAID ORDER.

A. *The Commission Has no Authority to Require Changes in Established Rates unless Such Rates are Unlawful.*

That the Commission is without authority to condemn, or require changes in, existing rates unless such existing rates are properly found to be unlawful is well established. Both the courts and the Commission have long recognized that it is not the function of the Commission to serve as traffic manager for the railroads. The initiative in matters affecting rate levels and structures lies with the carriers. If the rate structures which they evolve are just and reasonable, are free from undue preference or prejudice and are otherwise lawful, the Commission is not authorized to substitute its judgment for that of the carriers with respect to the appropriate level of any particular rate or group of rates. Recognition of this inherent limitation upon the Commission's grant of authority has been widespread and repeated. As this Court said, in *Interstate Commerce Commission* v. *Chicago G. W. Ry.*, 209 U.S. 108 (1908),

> "It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager . . .
>
> "'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue

preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.' " (Pp. 118-9)

and as the Commission itself recognized in *Lumber from Pacific Coast to Eastern Points*, 210 I.C.C. 317 (1935),

> "The respondents (railroads) may be mistaken in their judgment as to the effect of those reductions, but that fact is not determinative of the lawfulness or unlawfulness of the rates in question. They are entitled, as a matter of right, to make the experiment unless upon this record we can say that their action or its probable results will violate some provision of the act." (P. 346)

B. ***An Order of the Commission is Invalid Unless the Ultimate Findings upon which Said Order Rests are Supported by Adequate Particular Findings which in Turn are Supported by Substantial Evidence.***

This Court has made clear, in earlier decisions, the standards to which an order of the Commission must conform in order to be sustained as a valid order.

Such order of the Commission, to be valid, must contain not only ultimate findings, but also particular findings which warrant the ultimate findings, and these particular findings must be supported by substantial evidence. The necessity for appropriate ultimate findings was pointed out in *United*

States v. *Chicago, Milwaukee & St. Paul R.R. Co.*, 294 U.S. 499 (1935) as follows:

> "This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida* v. *United States*, 282 U.S. 194, 215; *United States* v. *Baltimore & Ohio R. Co.*, 293 U.S. 454. (P. 504)

But appropriate ultimate findings are not sufficient. Parties are entitled to know how those findings are arrived at in order that they may determine whether the Commission erred in its application of the law and whether its conclusions are supported. In this connection the Court pointed out in the *Milwaukee* case,

> "The second report of the Commission is a long and discursive narrative. Two paragraphs at the end give the key to its meaning (200 I.C.C. 621, 622): . . .
>
> "The statement in the second of these paragraphs that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole, *and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated.*" (Emphasis supplied) (pp. 505-6)

That the evidence must lend substantial support to the findings needs no citation of authority.

In view of the foregoing, it is obvious that an order of the Commision is invalid if the Commission's findings of fact are inconsistent with its ultimate findings and its order.

C. *The Commission's Ad Interim Order Requiring a 10% Increase in Official Territory Class Rates Cannot be Sustained as a Valid and Appropriate Correction of a Violation of Section 1 of the Act.**

The Commission's order in this proceeding requiring an increase in Official Territory class rates cannot be sustained as a valid order for the correction of a Section 1 violation because the Commission has not made a proper and valid finding that such rates are violative of Section 1 and its subsidiary findings preclude such a finding.

1. *Rates are not unreasonably low, in violation of Section 1 of the Act, unless they are either noncompensatory, or otherwise threaten to have harmful effects upon the revenues and therefore the transportation efficiency of the carriers which maintain such rates or of other and competing carriers.*

a. *The law was such prior to the legislation of 1940:*

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* In Point One of this brief it was pointed out that the Commission's order here under consideration is integral and has been wholly vitiated by the Commission's action and findings in Ex Parte 162. The remainder of this brief is devoted to argument that, wholly apart from said order in Ex Parte 162, the Commission's ad interim order cannot be sustained under either Section 1 or Section 3 of the Act, the only sections which the Commission "found" violated. (Rep. 700-702, R. 315-317) This portion of the argument dealing with the Commission's Section 1 finding, is concerned only with that portion of the Commission's order which required increases in Official Territory class rates, and which will, if sustained, provide the basis for higher than present class rates in Official Territory under the Commission's Ex Parte 162 order. The invalidity of that part of the order which required reductions in Southern, Western and interterritorial rates has already been considered.

Sections 1(4) and 1(5)(a) of the Act (U.S.C., Title 49, Sections 1(4) and 1(5)(a)) insofar as pertinent, provide as follows:

> "(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; . . .
>
> "(5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

While the Commission in its supplemental report has purportedly "found" that Official Territory class rates are unreasonably low, such a finding is, of itself, a mere conclusion of law. The Commission's statement that Official Territory class rates are unreasonably low, to quote Mr. Justice Cardozo in *United States v. Chicago, Milwaukee & St. Paul R.R. Co.*, (supra)

> ". . . must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated." (p. 506)

The "facts more particularly stated" which are required to sustain a conclusion that rates are unreasonably low in violation of Section 1 of the Act are facts which show that the rates are either themselves non-compensatory and burden other traffic or threaten, because of their low level, to create a noncompensatory rate situation for other and competing carriers. While the Commission has had jurisdiction over railroad rates since 1887, it was not given authority to order increased rates until the enactment of the Transporta-

tion Act of 1920. The power then grudgingly given was given in recognition of the fact that, while inexpensive transportation is generally in the public interest, the public interest can be adversely affected by the maintenance of rates which are so low as to burden other traffic of the publishing carrier or to impair the efficiency of the national transportation system or any part of it, and that the Commission should be empowered to prevent these results. In recognition of these inherent and well-understood limitations upon the Commission's minimum rate power, it has been consistently held that a finding of a Section 1 violation cannot be sustained unless it appears that the rates claimed to be unreasonably low are noncompensatory or threaten a noncompensatory situation. Thus in *Texas & Pacific Railway Co. v United States*, 289 U.S. 627 (1933) this Court said

> "... The evidence failed to show that the rates of the Texas and Pacific and the L. R. & N. on export and import shipments to and from New Orleans were not compensatory. The Commission refused to find that they were so low as to cast a burden on other traffic. There was therefore no basis for an order fixing minimum reasonable rates under Section 15(1) of the Act." (P. 633)

and in *United States v. Chicago, Milwaukee & St. Paul Railroad.*, (supra), in holding an ordered increase invalid, this Court said

> "There is no suggestion in the report that the rates have been so reduced as to be less than compensatory ... they do not pass the minima beyond which charges are too low." (P. 506)

> "... There is not a fact to indicate that the rates so reduced will be less than compensatory or that capacity for service to the public will be impaired or put in jeopardy." (P. 507)

Counsel for the United States and for the Commission have previously cited, and will undoubtedly cite to this Court, the cases of *Jefferson Island Salt Mining Co. v. United States*, 6 F. 2d 315 (1925); *Scandrett v. United States*, 32 F. Supp. 995 (1940) or *Youngstown Sheet & Tube Co. v. United States*, 295 U.S. 476 (1940) and argue that, in each of said cases, a minimum rate order was sustained without proof or finding that the rates which the Commission ordered increased had been noncompensatory. While this proposition is literally true, there is nothing in any of said cases which casts doubt upon the proposition that a conclusion that rates are unreasonably low requires a finding either that such rates are noncompensatory or that they threaten to create a noncompensatory situation. In each case there was a finding of a threatened noncompensatory situation. In the *Jefferson Island Salt Mining* case the Court referred to the necessity of avoidance of ruinous rate wars and to the maintenance of a reasonable relation between cost of service and rates as a justification of the Commission's order. In the *Scandrett* case, the finding was that the rates condemned were so low that competing motor carriers, if they were to continue to compete, would be forced to publish ruinously destructive noncompensatory rates. Similarly, in the *Youngstown* case the Commission's concern was with the maintenance of the existing rate structure and the avoidance of a situation which would precipitate destructive and ruinous rate reductions.

If a railroad chooses to publish a particular rate, and that rate is high enough so that the railroads are compensated, gh enough to permit good service without burdening other traffic of the railroad, and not so low that competing carriers will either be weakened or be forced to burden their other traffic if they try to meet the rate and continue to compete, then that rate is not unreasonably low,

and the Commission has no power to order the rate increased.

The argument may be made that a rate, even if it meets all of the tests just outlined, can be found unreasonably low merely because it creates discrimination (which the rates in this case do not, as will hereinafter be pointed out), but this Court has never so held, and the proposition itself is unsound. Nothing in the *Youngstown* case warrants a claim that a rate may be found unreasonably low and higher rates prescribed merely because lower rates would create undue discrimination. It is true that the Commission found undue prejudice in the *Youngstown* case, but the finding upon which its order rested was that lower rates would tend to disrupt the entire rate structure and this Court took pains to exclude the finding of undue prejudice as a basis for the minimum rate order, saying

> "The order of the Commission was based primarily upon the unreasonableness of the minimum prescribed. The existing rate structure *furnished support for the finding of unreasonableness.*
>
> ". . . It is true the Commission found prejudice to shippers all rail, *but in essence* the order entered was a Section 15 order and not one made under Section 3." (P. 480) (Emphasis supplied)

The unsoundness of any possible claim that a rate can be found unreasonably low merely because it is discriminatory can be developed through an example. Suppose points A and B are the same number of miles from point C and that transportation conditions are the same between A and C as between B and C. Suppose further that the rate from point A to point C is $1.00 per 100 lbs. and that this rate, meeting all of the tests of reasonableness previously outlined herein, is high enough to be compensatory, warrants good service without burdening other traffic and is not so low as to embarrass competing carriers, rail or otherwise. If the carrier which charges $1.00 between A and C charges $1.25

between B and C, it discriminates in favor of A and against B. But it is the relationship between the AC-BC rates which produces the discrimination, not either of the rates by itself. It is absurd to say that because the relationship is discriminatory, the $1.00 rate is unreasonably low, and the $1.25 rate unreasonably high. Proof of such absurdity is that, if the carrier were to reduce the high rate to the level of the low rate, the discrimination would disappear and the low rate would cease being "unreasonably low". Obviously the lower rate was never "unreasonably low", for if it had been, its "unreasonableness" could not have been remedied by adjusting another and different rate.

b. *The 1940 "amendments" to the Act did not change the test of unreasonableness.*

In its report, the Commission has referred to three provisions of the Transportation Act of 1940 and has indicated its belief that its order is justified in the light of such provisions (R. pp. 688-692). These provisions are:

(1) the provision extending the prohibitions of Section 3(1) of the Act to include prohibitions against undue preference of and undue prejudice to "regions, districts and territories";

(2) the provision authorizing and directing the Commission to institute an investigation of certain rates within and between territories and to enter appropriate orders for the removal of any unlawfulness found to exist (Section 5(b)); and

(3) the statement of national transportation policy contained in the preamble.

Of these three provisions only the first actually amends the Interstate Commerce Act and this provision merely adds "regions", "districts", and "territories" to the objects protected against undue preference and prejudice under the Act. It did not alter the tests of unreasonableness of rates

under Section 1 of the Act. The amendment had nothing to do with Section 1. While the amendment made clear that rates are unlawful if they unduly prefer and prejudice regions, districts or territories, such rates are unlawful under Section 3 of the Act, and not under Section 1. They are unlawfully prejudicial only; they do not, by any force of the amendment, become unreasonably high or low in violation of Section 1. Just as the finding of prejudice to all-rail shippers in the *Youngstown* case was not material to the finding of a Section 1 violation, so a finding that rates discriminate against a region, district or territory would not be material on the issue of their reasonableness under Section 1. Whether Official Territory class rates are unreasonably low must be determined without regard to the 1940 amendment of Section 3.

Nor does Section 5(b) of the Transportation Act of 1940 either change the tests of reasonableness or extend the Commission's powers with respect to the removal of unlawfulness when found to exist. Section 5(b) merely authorizes and directs that specific investigations be made by the Commission and this is not confined, as here, to class rates but extends to all rates in the fields described. Section 5(b) authorizes and directs the Commission

> "to institute an investigation into the rates on manufactured products, agricultural commodities, and raw materials, between points in one classification territory and points in another such territory, and into like rates within any of such territories, maintained by common carriers by rail or water subject to part I of the Interstate Commerce Act, as amended, for the purpose of determining whether said rates are unjust and unreasonable or unlawful in any other respect in and of themselves or in their relation to each other, and to enter such orders as may be appropriate for the removal of any unlawfulness which may be found to exist: Provided . . ."

This section clearly makes no attempt to change the tests of rate reasonableness. The direction is merely to deter-

mine "whether said rates are unjust and unreasonable or unlawful". The standard of determination is obviously the existing standard of the Act. No other standard is even hinted at. Nor does the section increase the Commission's power with respect to remedies for unlawfulness. Nothing, for example, contains any suggestion that a minimum rate may be fixed when theretofore it might not be. The direction is to enter, in the event of a determination of unlawfulness, an "appropriate" order. In this respect the section is analogous the Hoch-Smith Resolution of 1935 which provided that, upon a determination of unlawfulness, the Commission should order any "lawful change". The Commission interpreted this mandate as a broadening of its powers. This Court said in *Ann Arbor R.R. Co. v. United States*, 281 U.S. 658 (1930) with respect thereto, however,

> "The third paragraph was construed by the commission as making a change 'in the basic law' . . . Indeed it is apparent from the commission's opinions that it regarded this paragraph as requiring it to condemn the existing rates as unreasonable and unlawful, although, had they been considered independently of the paragraph, they must have been upheld as reasonable and lawful under the applicable sections, 1(5) and 3(1), of the existing law.
>
> "We are of opinion that the commission's construction can not be supported. The paragraph does not purport to make any change in the existing law, but on the contrary requires that that law be given effect. Nor does it purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law." (pp. 667-8)

And, as the United States District Court said, in *Anchor Coal Co. v. United States* 25 F. (2d) 462 (1928), in commenting upon the reliance placed upon the Hoch-Smith

resolution by the Commission in the proceedings there under review,

> ". . . the fact that the Commission seemed to consider that the Hoch-Smith resolution required it to consider or give effect to industrial conditions and the shift of traffic, or at least showed a spirit and purpose in that regard which should be deferred to, is of itself sufficient to invalidate the order complained of." (P. 474)

It is clear that the direction to make an appropriate order is a direction to make an order appropriate under the governing law—the Interstate Commerce Act. Power to issue a minimum rate order under circumstances which would not otherwise have permitted such an order cannot reasonably be inferred from this language. Such drastic interference with the managerial discretion of the carriers cannot so easily be inferred.

The remaining provision of the Transportation Act of 1940 upon which the Commission in these proceedings seeks support for its unprecedented action, namely, the declaration of policy contained in the Act, is obviously a make-weight and not only lends no strength to the Commission's decision but actually emphasizes the intended continued application of existing and established standards. The declaration sets forth that it is the national transportation policy, among other things,

> "to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue preferences or advantages or unfair or destructive competitive practices."

2. *The Commission has not found and, on the evidence, could not find, either that Official Territory class rates are noncompensatory or otherwise threaten to have harmful affects upon the revenues of the carriers which maintain such rates or of other and competing carriers; in fact, the Commission's own subsidiary findings preclude such a finding.*

a. *The Commission has not found that Official Territory class rates are noncompensatory or threaten to create a noncompensatory situation.*

In its original report the Commission carefully refrained even from finding that class rates within Official Territory (which by its ad interim order were ordered increased 10% and which the report implies should ultimately be increased approximately 15%) were unreasonably low. The Commission made only the ultimate finding,

> "1. That the intraterritorial class rates . . . applicable within official, Illinois, southern, southwestern, and western trunk-line territories, are, and for the future will be, unjust and unreasonable, in violation of section 1(4) and (5)(a) of the act." (Rep. 700-701, R. 315-316).

This omission did not escape the attention of the late Commissioner Porter, whose vigorous dissenting opinion has previously been referred to. As Commissioner Porter pointed out, after stating that, in his opinion, the record fell "far short of supporting the finding that to be just and reasonable and free from undue prejudice and preference, the class rates throughout the area east of the Rocky Mountains must be placed in a strait-jacket of a uniform distance scale",

> "Even the report does not warrant such a conclusion, and it seems the majority could not quite bring themselves to make the direct finding that the class rates are and will be unlawful where and to the extent that they depart from such a scale." (Rep. 712, R. 327).

When this absolute lack of any particular finding to support its ultimate finding was called to the Commission's attention, the Commission, without further evidence, prepared and filed its supplemental report (R. 432), in which it amended its prior report to include the following finding:

> "We are of the opinion that our findings as to those rates are sufficiently stated in the prior report, but to remove any doubt, we find that the class rates within official and Illinois territories are less than just and reasonable rates, with the exceptions as stated in the prior report and in this report, and therefore unlawful. . . ." (Supp. Rep. 62, R. 467)

This supplemental finding is not sufficient. It is itself merely a conclusion of law. No finding short of a finding that Official Territory class rates are noncompensatory or threaten to create a noncompensatory situation will meet the requirement as to necessary preliminary findings of *United States* v. *Chicago, Milwaukee & St. Paul R. R. Co.* (supra).

No such finding has been made.

b. *The record will not warrant, and the Commission's own subsidiary findings preclude, a finding that Official Territory class rates are noncompensatory or threaten to create a noncompensatory situation.*

(1) *The evidence does not warrant, and the Commission's subsidiary findings preclude, a finding that Official Territory class rates, generally, are noncompensatory or threaten a noncompensatory situation.*

At no time during the entire course of the proceedings was any claim asserted or any evidence offered which would tend to show that Official Territory class rates generally were noncompensatory or threatened to create a noncompensatory situation. No respondent, no shipper and no competing carrier so asserted. If, in fact, Official

Territory class rates were too low, it is reasonable to suppose that protest would have been made to the Commission in these proceedings, either by the Official Territory railroads, objecting to an unduly low level of earnings, or by the shippers in Official Territory who use commodity and exception rates, objecting to the burden cast upon them by the fact of unduly depressed class rates, or by competing carriers, claiming inability to meet the railroads' rates. Unreasonably low class rates would necessarily result in (a) noncompensatory earnings for the carriers maintaining such rates and/or (b) unreasonably high rates on other traffic and/or (c) competitive disadvantage to other and competing carriers. Yet none of these groups complained of the general level of Official Territory class rates. The railroads in Official Territory defended the lawfulness of their existing rate structures at every stage of the proceedings, and as soon as the order of this Court was made, enjoining enforcement of the Commission's minimum rate order, the Official Territory carriers took prompt action to cancel the class rate increases which the Commission's orders had required them to publish. (See R. 809) Neither was any protest made by any shipper or shipper's representative in Official Territory. No shipper or shipper's representative who testified concerning Official Territory rates asserted that they were too low, and an examination of the record will clearly so show. Competing carriers' complaints were limited to certain less-than-carload rates (hereinafter considered) and did not relate either to carload class rates (which are both numerically and from a traffic standpoint, far the more important) or to class rates generally.

Official Territory class rates were not even attacked as too low by those parties who complained of the nonuniformity of class rates throughout the nation. In fact, many of these southern and western proponents of uniformity recommended the adoption of the Official Territory level of class rates in their own territories. Others stated

merely that the problem of how uniformity should be achieved should be left to the Commission; they did not suggest that the record warranted an increase in Official Territory rates.

Official Territory class rates not only were not claimed by anyone in the proceeding to be unreasonably low but such rates could not possibly have been shown to be less than reasonable rates or noncompensatory. Subsidiary findings based upon evidence credited by the Commission confirm this unequivocally. The revenues of the Official Territory carriers are, and consistently have been, adequate for a number of years, during which the present Official Territory class rate adjustment has been in effect. The following chart, from Page 613 of the Commission's Report, (R. 228) reflecting earnings in terms of percentage return on investment of the carriers in Southern Territory and Eastern District (which, as defined at page 605 of the Report (R. 220), is virtually synonymous with Official Territory) shows not only that Official Territory earnings have been completely adequate in recent years (averaging 4.28% for the three-year period 1941-3) but also that even in the depressed period of earnings in the 1930's, the Official Territory carriers consistently had either greater or approximately the same earnings as the Southern carriers, *whose class rates the Commission found excessive:*

	Southern region Percent	*Eastern district Percent*
Year 1936	2.52	2.67
Year 1937	2.35	2.27
Year 1938	1.90	1.26
Year 1939	2.50	2.34
Year 1940	2.57	2.66
Average of 1936-1940	2.37	2.24
Average of 1941-1943	5.49	4.28

So also, the fact is, and the Commission has so found (Supp. Rep. 65, R. 471) that class rates are the highest rates which the railroads publish and therefore produce

greater mile-for-mile revenues than any other rates which the railroads publish. The 17.6% of the traffic which (according to the traffic study made and submitted in evidence in the proceedings before the Commission as Exhibit 228)* moves on exception rates within Official Territory, and a substantial portion of the 76.7% of the traffic which (according to said study) moves on commodity rates therein, necessarily moves on rates which are lower than class rates in relation to the cost of the transportation service furnished, for these exception and commodity rates are all** rates which the railroads have published in lieu of the higher class rates which would otherwise be applicable.

The conclusion is inevitable that class rates generally cannot be found to be unreasonably low or noncompensatory in Official Territory, when, as the Commission has found, the Official Territory rate structure, as a whole, afforded the Official Territory carriers a profit upon their investment (more than 4.25% in 1943, the latest year for which complete data were available at the time of the Commission's decision (Rep. 612, R. 227), and when, as the Commission has found, 94.3% of all Official Territory traffic moves on rates which are not class rates (Rep. 564, R. 179).

Subsidiary findings of the Commission also preclude a finding that Official Territory class rates threaten a noncompensatory situation. Thus the Commission has found that virtually all of the class rates which it "found" unlawful were established as the result of its general rate investigations between 1925 and 1930, subject to certain relatively minor modifications in 1934, 1935, and 1938 and a general increase in 1938. (Rep. 516, R. 131) The Official Territory rates were, as the Commission finds, founded upon distance scales and key rates prescribed by the Commission in 1930,

*R. 11,834. Summarized at p. 564 of the Report. (R. 179)

**Except only rates published for the relatively few commodities which are not included in the Consolidated Classification.

and except for the general increase of 1938 and certain lake-rail modifications made in 1935, had remained virtually unchanged since that time. (Rep. 517, R. 132) These findings would preclude the Commission from finding that the continuance of Official Territory class rates at their existing levels would threaten ruinous rate wars, or disturb seriously the established rate structure, or force other and competing carriers to suffer ruinous rate reductions. These findings show that the Official Territory class rates were integral and important parts of an established rate structure of approximately 15 years standing and obviously therefore could not threaten to disturb that structure.

(2) *The evidence does not warrant, and the Commission's own subsidiary findings preclude, a finding that any particular Official Territory class rates are noncompensatory or threaten a noncompensatory situation.*

The only claim that any Official Territory class rate was unreasonably low was the claim advanced by certain motor carrier interests that less-than-carload class rates are unduly low in *all* territories and should be increased. No claim was made that any Official Territory carload class rate was noncompensatory. The motor carriers' claim was based upon the Edwards Cost Studies, so called, which are referred to in the Commission's Report and which were claimed to indicate that, upon certain assumptions, less-than-carload rates applicable to *third class and lower* are inadequate to cover out-of-pocket expenses, including the costs incurred in performing pickup and delivery services, plus constant expenses which are allegedly attributable solely to the handling of less-than-carload traffic.

The Commission's subsidiary findings in its supplemental report provide the best refutation of any claim that the evidence, consisting only of these Edwards Cost Studies, shows that less-than-carload class rates are noncompensatory, either in Official Territory or any other territory. In the first place, as the Commission has found, the *Edwards*

Cost Studies, upon which the claim of unreasonableness is based, *do not reflect presently existing conditions*. As the Commission states, in answering the objection of the motor carriers to the *reduction* of Southern and Western less-than-carload rates,

> "The petitioners contend that our finding that the less-than-carload class rates should be reduced, except in official territory, is in conflict with our finding on page 697 of the original report, based upon the cost data, that less-than-carload traffic generally is not bearing its proper share of the costs of transportation. *That finding was based on operations of the railroad in 1939* when the average load per car of less-than-carload shipments amounted to only 4.3 tons in the West, 5.5 tons in the South, and 6.4 tons in the East including Pocahontas and New England territories. *Since then there has been a substantial increase in the average loading of such shipments which has materially decreased the unit costs* attributable to less-than-carload traffic. The increased loading was brought about under war-time conditions, but it does not follow that in the post-war period, especially in the immediate future, loadings will decline to the levels of 1939." (Supp. Rep. 65, R. 471) (Emphasis supplied)

Secondly, as the Commission has found, the cost studies are not reflective of the cost of handling merely *class rate* less-than-carload traffic, but rather, they reflect the cost of handling *all* less-than-carload traffic, including all of the less-than-carload traffic which moves on exception and commodity rates. Thus, the Commission states,

> "The cost data on less-than-carload traffic relate to such *traffic as a whole* and not solely to that which moves on class rates. In appraising the figures it must be borne in mind that much of this traffic does not move on class rates, but on exception rates and commodity rates. Obviously, the class-rate traffic bears the highest rates. Consequently, even if under present conditions less-than-carload traffic, as a whole, in the West and South is not paying its proper share of the costs, it is possible that such result is due in a large measure to the maintenance of exception and commodity rates." (Supp. Rep. 65, R. 471-2)

From the foregoing supplemental findings of the Commission it is apparent that the record will not permit a finding that any less-than-carload rates in Official Territory are unreasonably low or noncompensatory. The Commission has itself pointed out the two principal reasons why the Edwards Cost Studies cannot be used as a basis for testing the compensatory character of any less-than-carload class rates. There was no other evidence or finding bearing on the issue.

Just as the subsidiary findings referred to preclude a finding that any particular Official Territory class rate or group of class rates was noncompensatory, so also other findings which the Commission has made would preclude its finding that any such rate or group of rates threaten to create a noncompensatory situation. The Commission has found specifically that there is no evidence which would enable it to determine whether any particular classification rating is, or was, unreasonable. (Rep. 502, R. 117) The Commission has also found that, "A (classification) rating must be complemented by a class rate, and vice versa, in order to give substance to either." (Rep. 473, R. 88) These two findings constitute an admission by the Commission of what was the fact, namely, that there was no evidence which would enable the Commission to find any particular class rate unreasonable, whether unreasonably low or unreasonably high.

3. ***Even if the evidence had warranted (as it does not) and the Commission's findings had not precluded (as they do) a finding that Official Territory less-than-carload rates or any other particular class rates are unreasonably low such a finding would not warrant an order increasing all Official Territory class rates.***

As has hereinbefore been pointed out, the record contains no evidence which has any tendency to show that Official Territory carload class rates, or class rates generally, or Official Territory first and second class less-than-carload class rates, are lower than reasonable minimum rates, and

the subsidiary findings of the Commission bar any such finding.

The only rates which were placed in issue with respect to reasonableness were third and lower class less-than-carload rates, and here again not only the lack of evidence, but also the subsidiary findings of the Commission, bar any finding that such rates are less than reasonable rates.

But even if the Commission had found, based on substantial evidence (and it has not) that third class and lower less-than-carload class rates in Official Territory are unreasonably low, such a finding obviously would not warrant a finding that *all* class rates in Official Territory are unreasonably low. Without such findings, supported by substantial evidence, no basis is provided for the entry of the present minimum rate order to correct unreasonableness. No one has contended that first and second class less-than-carload class traffic and all carload class traffic in Official Territory is not paying the full cost of its transportation and more, and if certain other less-than-carload rates were in fact shown to be burdening other traffic, such rates would be burdening *all* other traffic, including *all* other class rate traffic. If this were the case, the only course properly open to the Commission, in the event of a finding that certain less-than-carload rates are unduly depressed, would have been to order increases in the specific "unlawful" less-than-carload rates. The burden, if any, to which all other class rate traffic is subjected cannot be alleviated by *increasing* the rates upon that traffic, and such rates, not themselves unreasonably low, could not lawfully be increased.

D. *The Commission's Ad Interim Order cannot be Sustained as a Valid and Appropriate Correction of a Violation of Section 3 of the Act.*

There are two complete and insurmountable obstacles to any attempt to sustain the Commission's order in this proceeding as a valid order to correct a violation of Section

3. First, the record does not warrant, and the preliminary findings of the Commission are inconsistent with and therefore preclude the Commission's ultimate finding of a Section 3 violation. Second, even had the record warranted a finding of an unlawful relationship of rates in violation of Section 3 of the Act, the Commission's authority would be limited to the entry of an alternative order, there being various possible and lawful methods of correcting the relationship.

1. *The record does not warrant, and the preliminary findings of the Commission are inconsistent with, and therefore vitiate, the Commission's ultimate finding of a Section 3 violation.*

a. *Rate disparity does not result in undue preference and prejudice within the meaning of Section 3 of the Act unless such disparity (1) results in disparity in actual shipping charges, (2) causes injury, and (3) is unjustified by transportation conditions. The 1940 amendment of Section 3 of the Act did not alter this well-established concept.*

Section 3(1) of the Act provides as follows:

> "It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

For the relationship of any two or more rates to result in undue preference and prejudice within the meaning of Section 3 it is clear that the relationship between the allegedly preferential rates and the allegedly prejudicial rates must result in disparity in actual charges (that is, it must appear that the rates or groups of rates complained of actually apply and that neither has been superseded in fact by other rates); that the disparity is actually injurious to the prejudiced shipper or territory, and that the disparity is unjustified.

The first of these elements, namely, the requirement that the rates which allegedly result in preference and prejudice must be found to produce disparity in charges is of critical importance in this proceeding, notwithstanding the fact that it appears to be self-evident and elementary. A class rate of $100 between two points in Official Territory as compared with a class rate of $110 between a point in Southern Territory and a point in Official Territory cannot be preferential of Official Territory or shippers therein and prejudicial to Southern territory or shippers if in fact there is a commodity or exception rate of, for example, $90, which supersedes the class rate and which is the actual rate charged for the interterritorial movement from the South to Official Territory. There would obviously be no justification for equalizing the two class rates at $105, if the Southern shipper had available already a $90 rate. The so-called equalization would merely be penalization of the Official Territory shipper.

Because this proceeding is concerned with class rates only and because the Commission has concluded that certain class rate differences result in preference and prejudice, it is necessary that this Court determine whether the record warrants a finding (which is essential but which the Commission has not made) that class rate differences actually produce differences in charges. If the class rate for a particular commodity has been superseded, and in effect cancelled, by the railroads' establishment of a commodity

rate or an exception rate—so that no shipper would or could be charged the class rate—the class rate does not result in a charge, and could not prefer or prejudice.

That a finding of undue preference and prejudice also requires a finding of injury resulting from rate disparity is well established. Thus, this Court, in *Interstate Commerce Commission v. Chicago Great Western Railway*, 209 U. S. 108 (1908), in invalidating an order of the Commission which condemned a rate relationship under Section 3 of the Act, rested its decision principally upon the lack of convincing evidence of injury, saying:

> "While it may be that the proceedings are not to be narrowly limited to an inquiry whether this particular complainant has been in any way injured by the action of the railroad companies, yet that question must be regarded as the one which was the special object of inquiry and consideration." (P. 118)

The Court then cited the lower court's finding that complainant had not been injured, and stated, at P. 121:

> "If . . . the lower rate given to the packers does not directly influence or injure the shippers of livestock, it is difficult to see what foundation there can be for the claim of an undue and unreasonable preference."

The Commission itself has consistently recognized the necessity for a finding of injury in a Section 3 proceeding.

Duluth Chamber of Commerce v. Chicago, St. P., M. & O. Ry. Co., 122 I. C. C. 739, 742 (1927)

Utah State Automobile Association v. Atchison, T. & S. F. Ry. Co., 92 I. C. C. 376, 386 (1924)

City of Moorhead v. Great Northern Railway Co., 172 I. C. C. 38, 42-3 (1931)

U. S. Phosphoric Products Corp. v. Butte, A. & P. Ry. Co., 153 I. C. C. 459, 465 (1929)

Federated Metals Corp. v. Pennsylvania Railroad Co., 161 I. C. C. 287, 288 (1931)

The third essential element of undue preference and prejudice, namely, that such disparity in charges, if any, as the rates produce is not justified by transportation conditions is well recognized. As this Court stated in *United States v. Illinois Central Railroad Company*, 263 U. S. 515, 524 (1924),

> "To bring a difference in rates within the prohibition of Section 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, *unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions.*" (Emphasis supplied.)

The 1940 amendment of Section 3(1) in no way alters the tests of unlawfulness thereunder. As has hereinbefore been pointed out, that amendment merely added "regions, districts and territories" to the list of entities which are protected against discrimination under the Act. The amendment does not affect or purport to affect the tests of preference and prejudice or the test of what is "undue". The chain of circumstances which so indicates began with the decision of the Commission in the *Texas & Pacific* case (supra) in which the Commission found that the port of New Orleans was unduly preferred by a certain rate relationship and that the port of Galveston was unduly prejudiced thereby. This Court subsequently held in that case that a port was not a locality and that, as Section 3 (in its then wording) forbade only undue preference of and undue prejudice to "any particular person, company, firm, corporation or locality, or any particular description of traffic", a port could not be unduly preferred or prejudiced. Shortly thereafter Congress amended Section 3 so as to include "ports" and "gateways" as points which might not lawfully be preferred and prejudiced. This still left open the question of whether a region, district or territory could be

said to be a locality (rather than merely a group of localities) and hence protected against undue prejudice. Accordingly, in the Transportation Act of 1940, Congress again amended Section 3 so as to make clear that regions, districts and territories come within the protective purview of the Act. But the test of when preference and prejudice are undue was in no way affected. The issue was not presented any more than it had been presented by the earlier proposal that "ports" be allowed to complain when unduly prejudiced. See: *Albany Port District Commission* v. *Ahnapee & W. Ry. Co.*, 219 I.C.C. 151, 171 (1936); *City of Philadelphia* v. *Baltimore & O. R. Co.*, 231 I.C.C. 21 (1938). It is obvious that, in a Section 3 proceeding involving any other than a "region, district or territory", it must be shown that the relationship arises from rates actually in force which cause injury and which are unjustified by transportation conditions. *It is absurd to contend that Congress, when it added the words "region, district and territory" to the list of entities which might not lawfully be preferred or prejudiced, contemplated an exception with respect to these entities alone in the application of the tests of unlawfulness or gave the Commission more extensive powers, in this instance alone, with respect to the removal of preference and prejudice.* As the late Commissioner Porter pointed out,

> "Certainly there has been no change in the criteria, to one of which I have just referred, which have long been applied by us in determining whether undue prejudice or preference exists." (Rep. 722, R. 337)

Nor can it be successfully contended that, when discrimination between territories is drawn in issue, the requirements of the Act with respect to quantum of proof of unlawfulness are less exacting. If anything, the required quantum of proof should approach maximum in a proceeding wherein the Commission's order will affect rates throughout at least one-quarter of the nation (and no territory comprises substantially less).

b. *The Commission's ultimate finding of a Section 3 violation is not only based upon a misconception of law, but is unwarranted by the record and inconsistent with the Commission's own subsidiary findings.*

(I) *The Commission misconstrued the Transportation Act of 1940.*

It has hereinbefore been pointed out that the Transportation Act of 1940 created no changes in the standards of lawfulness under the Interstate Commerce Act and no enlargement of the powers of the Commission with respect to the removal of unlawfulness when properly found to exist (See pages 34 to 37 and 50 to 51 hereof).

The Commission erroneously concluded otherwise. The Commission's minimum rate order requiring a 10% increase in Official Territory intraterritorial class rates manifests not an attempt by the Commission to remedy unlawfulness under the established and well recognized standards of the Interstate Commerce Act but rather one step in the attempt to impose uniformity of class rates upon the nation, in response to what the Commission supposes, erroneously, to be a new mandate of Congress. The key to an understanding of the Commission's findings and order lies in the Commission's interpretation of the provisions of the Transportation Act of 1940 which the Commission deems "recent amendments of the Act". With respect to these provisions, the Commission states, at Page 692 of its Report (R. 307),

> ". . . *it is clear that the main purpose which Congress had in mind was to bring about a greater degree of equalization, harmony, and uniformity in the different regional or territorial rate structures of the country.* The method employed to accomplish this purpose is equally plain. By the amendment to the substantive antidiscrimination provisions of section 3 (a) all discriminations in the form of undue or unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage, as between regions, districts, or territories, viewed as separate entities, were

> brought directly within the purview of the act along with all the other inhibitions previously included. We were then authorized and directed by the other provisions mentioned to remove any such discriminations found to exist in a proper proceeding. This means that such discriminations as those mentioned which result from differences in the methods of distributing the general rate burden in the several rate-making territories, or from any other cause, if not justified upon proper consideration of recognized elements of rate making *applied in the light of the amended law* are unlawful and should be corrected." (Emphasis supplied)

It is highly significant that the Commission believes that the amended law effects changes either in the recognized elements of rate-making or in the manner in which they are to be taken into account as justification for rate differences. This statement evidences clearly the Commission's belief that Congress has empowered the Commission to achieve rate uniformity or nearer uniformity throughout the nation and to establish uniformity or nearer uniformity as a new standard of lawfulness. Acting on this completely erroneous assumption, the Commission has proceeded to find that, because class rates are not uniform throughout the United States, they are therefore not lawful.

Clearly the order complained of in this proceeding is based upon an erroneous theory of law.

With respect to such an order the Court said in the *Anchor Coal* case (supra):

> "If, however, in making the order complained of, the Commission has exceeded its powers, or has proceeded upon an erroneous theory of law . . . the courts are not bound by its action." (P. 471)

(2) *The record will not warrant, and th Commission's own subsidiary findings are inconsistent with its ultimate finding of undue preference and prejudice.*

The Commission has found that class rates applicable to transportation wholly within Official Territory are gener-

ally somewhat lower than class rates applicable to transportation into Official Territory from other territories, and that because of these differences, the Official Territory intraterritorial rates are unduly preferential to Official Territory generally and to shippers and receivers of freight therein and the interterritorial rates are unduly prejudicial to the other territories generally and to shippers and receivers of freight therein in violation of Section 3 of the Act. (Rep. 701, R. 316) In effect the Commission has found the rates in issue unlawful because not uniform.

As has hereinbefore been pointed out, however, uniformity is not, in and of itself, a standard of lawfulness. A finding of undue preference and prejudice requires more than a showing of differences in rates. It must appear that the rate differences result in *actual differences in charges*, that these differences cause injury and that the differences are not justified by transportation conditions. (See pages 47 to 51 hereof).

(a) *The record does not warrant, and the Commission's findings preclude, a finding that articles move, or even that articles generally move, both within Official Territory and into Official Territory on non-uniform class rates and that class rate differences therefore result in actual differences in shipping charges.*

Class rates for movement wholly within Official Territory are admittedly generally lower than class rates for movement into Official Territory, but it does not follow that a shipper must generally pay more (mile for mile) to ship goods into Official Territory than he would pay if he were shipping the same goods from one point in Official Territory to another. It would only so follow if the differing class rates were the only rates which actually applied to the respective movements. If the charge for transporting a particular shipment *into* Official Territory is determined by a commodity rate, or an exception rate, rather than by a

class rate, whereas the charge for the comparable intra-territorial shipment of the same commodity in Official Territory is determined by a class rate, the *difference in the class rates* cannot produce a difference in the charges actually paid for the two shipments. Similarly, if the applicable rate for the Official Territory shipment be a commodity rate, and the comparable rate for the shipment into Official Territory be a class rate, the *difference in class rates* cannot produce a difference in actual charges. Only if a particular commodity moves both into Official Territory and within Official Territory on class rates will the difference in class rates produce a difference in shipping charges.

These basic and elementary considerations underlie the inability of the record in this proceeding to support either a preliminary finding of the Commission that class rate differences produce differences in charges, or an ultimate finding that such class rate differences result in unlawful preference and prejudice.

The record affords no basis whatsoever for a finding, and subsidiary findings are inconsistent with a finding, even generally, that those articles which move on class rates *within* Official Territory also move *into* Official Territory on class rates or that articles which move on class rates into Official Territory move on class rates in Official Territory. The record and subsidiary findings show that, generally, the same traffic does not move both *within* and *into* Official Territory on the same kind of rates. Less than 6% of the total traffic within Official Territory moves on intra-territorial class rates and *almost no traffic moves on inter-territorial class rates into Official Territory.* (Rep. 564, R. 179) Less than 1% of the traffic moving into Official Territory from Southern Territory moves on class rates and only 3.1% of that moving from Western Territory (Rep. 564, R. 179). There is no basis for inference that the same or similar types of articles are involved in these unusually limited volumes or that, if they are, the class rates involved are more favorable to Official Territory shippers. In fact,

the likelihood is to the contrary. The probabilities are that the traffic which moves into Official Territory on class rates is moving on those class rates which are the same as, *or lower than,* Official Territory class rates. That there are many such rates is evident from the Commission's findings in Appendices 2 and 3 to its Report. (Rep. 731-733, R. 346-348). But, whatever the probabilities may be, the fact remains that *the record affords no basis for any finding either that articles move, or that articles generally move, both within and into Official Territory on class rates which are not uniform and are more favorable to the Official Territory shipper.* Such a finding could not be premised upon any evidence other than a traffic test reflecting the facts with respect to traffic movement within and into Official Territory, and admittedly no such test was offered in evidence. In the absence of such a traffic test, it cannot be assumed that those articles which move on class rates within Official Territory also move into Official Territory on class rates which are less favorable.

This infirmity in the record and these subsidiary findings are clearly fatal, for the *sine qua non* of a finding that the relationship *between two class rates* results in undue preference and prejudice in violation of Section 3 of the Act is evidence that the allegedly preferred shipper avails himself of *one of said class rates* and pays charges which are lower in relation to the service with which he is provided than does the allegedly prejudiced shipper who *must* avail himself of *the other class rate.* If either shipper does not use the class rate which allegedly prefers or prejudices him, but uses an exception or commodity rate, it becomes impossible, in the nature of things, to find that preference or prejudice results *from the relationship between the class rates.* The only preference or prejudice which could result would be from the relationship between the actual governing rates, whether class, commodity or exception, *and as to this there is no evidence.*

The Commission's error, in this regard, is not a mere technical error, but one of substance having far-reaching consequences. If the Commission's order is permitted to stand, despite this error, the effect will be that thousands of shippers in Official Territory will be required to pay increased freight rates in order to "correct" what is a wholly illusory "discrimination". Consider, for example, a jewelry manufacturer in New England shipping his manufactures throughout Official Territory on class rates, and on a representative shipment, paying, let us suppose, a rate of $100. Assume that a Southern jewelry manufacturer sells his product in Official Territory in competition with the New Englander and that if the Southern shipper were required to ship on class rates, his rate (for the same distance) would be $130. But the applicable rate for the Southern shipper is not the class rate, but either an exception rate or a commodity rate which is also $100. Yet the Commission would order the Official Territory rate increased to $110, and, in a wholly futile and useless gesture, order the Southern rate decreased to $117 ($130 less 10%). *Everything about such a situation is illusory except the $10 increase which the Northern shipper is required to pay.* The discrimination is wholly illusory; the reduction in the Southern class rate (already a "paper" rate) is meaningless. *The 10% increase in the Northern shipper's rate, however, is real, despite the fact that it is wholly unwarranted.*

The Commission is well aware that this situation is common. It has found that class rates, particularly within the South, are generally superseded by exception rates and commodity rates, and that the exception rates, particularly, tend to be of territory-wide application. This latter fact is important, for the Southern Classification and exceptions do it apply on interterritorial traffic from the South to the North. *The Commission has found that in 1940 the Southern carriers established exception rates for more than 3500 items in the Southern classification, thereby making "paper rates" of the 3500 formerly prevailing*

class rates. (Rep. 477, R. 92). *Yet the Commission has "found" these 3500 paper rates prejudicial to the South and, to remove that wholly illusory prejudice has ordered increases in Official Territory rates on these 3500 commodities.* The Commission's order requires higher Northern rates (to remove "prejudice") on 3500 articles (which were "removed" from the Southern classification in 1940) and on the many thousands of other articles for which the Southern carriers have established territory-wide exceptions. Yet the interterritorial *class* rates on these articles cannot possibly cause prejudice or injury, direct or indirect, because the *present* shipper pays and the *potential* shipper would or will pay, not the interterritorial class rate, *but an interterritorial exception rate.*

A record, which will not warrant a finding and which contains subsidiary findings which are inconsistent with a finding, that differences in the rates in issue even generally produce differences in shipping charges paid or required to be paid cannot sustain an ultimate finding that the rates in issue are violative of Section 3 of the Act.

(b) *The record does not warrant, and the Commission's subsidiary findings preclude, a finding that differences between class rates within and class rates into Official Territory result in injury.*

The record is barren of evidence of injury to any person or territories resulting from differences between class rates applicable within and class rates applicable into Official Territory or even of injury generally, consequent upon such differences. The absence of such evidence is inevitable in view of two circumstances pointed out in the preceding section hereof, (1) that there is a complete absence of evidence that *class rate* differences have even generally caused higher relative charges on articles moving into Official Territory than on articles moving within that Territory, and (2) that the record and subsidiary findings of the Commission demonstrate that differences between such

class rates cannot generally require the payment of higher rates for the movement into Official Territory, because the very small proportion of such traffic which is class-rate traffic, has not been shown to consist of traffic in the same articles as move on class rates within Official Territory.

Southern and Western proponents of rate uniformity attempted to show that injury had resulted from the lack of uniformity of class rates by attempting first to show that individual shippers have been injured by such lack of uniformity.

Recognizing that the evidence introduced by them to support this proposition had wholly failed to achieve its purpose, these proponents of uniformity next endeavored to show that industry generally in the territories other than Official Territory, and particularly Southern industry, had experienced an arrested growth and a retarded development which should be attributed to the lack of uniformity of class rates. This latter myth, as the record shows and as the Commission's subsidiary findings demonstrate (Rep. 621-2, R. 236-7), was completely exploded by overwhelming statistical evidence that dynamic growth, rather than arrested development, has been the principal characteristic of Southern industry in recent years.

The evidence which was introduced for the purpose of establishing injury to industrial shippers in Southern Territory is summarized in the subsidiary findings at pp. 615 to 619 of the Commission's report. (R. 230-234) This evidence was offered with respect to rates on particular commodities and, as appears from the Commission's subsidiary findings, cannot possibly be regarded as support of a finding of even the slightest injury. The products and shipping points in question, together with a summary of the testimony and/or the Commission's comments thereon are as follows:

(a) *Washboards from Raleigh, North Carolina*: The shipper of this commodity who uses class rates into

Official Territory, competes with two manufacturers in Official Territory. *Whether his competitors use class rates does not appear.* 25% of his shipments into Official Territory are to Detroit, adjacent to a competitor's plant. The Commission's comment is that: "The business of the manufacturer who gave his testimony . . . has increased substantially." (Rep. 616, R. 231)

(b) *Leather, hides, tanning extracts to and from Andrews, North Carolina*: On leather, both commodity and class rates apply, and the only shipments clearly identified as taking class rates (viz., less-than-carload shipments) were merely anticipated at the time of the hearings. Hides do not move *into* Official Territory from this shipper's plant. No showing was made as to rates applicable on tanning extracts. (Rep. 616, R. 231)

(c) *Wine from Atlanta, Georgia:* With respect to this testimony the Commission said: "The witness knew little about rates, and an exhibit prepared by his traffic man was erroneous. The applicable rates to most of the points shown on the exhibit are combination rates, one factor of which, are *exception* rates from Atlanta to border points." The witness' company has recently constructed a larger plant at Atlanta, indicating, according to the Commission "that the business has made substantial progress at that point." (Rep. 617, R. 232)

(d) *Macaroni products from Memphis, Tennessee:* This shipper does not ship into Official Territory but would use *an exception rate* if he were to do so. Moreover, his exception rate is approximately 10% lower than the rate which the Commission, in a special macaroni rate proceeding, has found reasonable and nonprejudicial. (Rep. 617, R. 232)

(e) *Furniture from Birmingham, Alabama:* The shipper *does not use class rates.* (Rep. 617, R. 232)

(g) *Cucumber pickles from Faison, North Carolina:* The shipper *does not use class rates,* but truck competitive rates, which are *lower* than Official Territory class rates. (Rep. 618, R. 233)

(h) *Peanut products from Columbus, Georgia:* The shipper *does not use class rates,* but commodity rates lower than class rates. (Rep. 618, R. 233)

(i) *Grading machinery from Taccoa, Georgia and Vicksburg, Mississippi:* The shipper *does not use class rates.* His first Eastern plant was in Official Territory. Later, he established two plants in the South because of its many advantages. (Rep. 618, R. 233)

(j) *Calendars:* These products move on class rates. The shipper claimed injury from the loss of a 1943 contract to supply calendars. He was, however, awarded the contract in 1944. (Rep. 618, R. 233)

(k) *Electric appliances:* As recently as 1938 the Commission reviewed these rates and found them lawful. Existing freight rates were not found to interfere with competitive relationship. (Rep. 618, R. 233)

(l) *Lead products:*
and

(m) *Iron and steel tanks:* The shippers of these products do not ship into Official Territory but sell their whole output in the South and have never requested competitive rates into Official Territory. (Rep. 618, R. 233)

(n) *Cloth and rags:* These commodities take both class and commodity (or exception) rates. *The rates complained of; however, were not class rates.* (Rep. 618, R. 233)

(o) *Steel automobile truck bodies from Nashville, Tennessee:* It was admitted that this shipper has been able to sell his product f. o. b. Nashville for Official Territory delivery. (Rep. 618, R. 233)

(p) *Shell boxes from Nashville:* The complaining "shipper" does not produce the boxes and has no contract to do so. Another, non-witness, manufacturer is actually shipping from Nashville. (Rep. 619, R. 234)

Such evidence, introduced by Southern proponents of uniformity to establish injury, relates to sixteen different

commodities or groups of commodities. In summary it is noteworthy that, of these sixteen commodities:

7 move, or would, if they did, move, into Official Territory on commodity or exception rates, rather than class rates (wine, macaroni, furniture, glass bottles, cucumber pickles, peanut products, and grading machinery)

1 moves on class rates which are not complained of (cloth and rags)

1 moves on commodity rates into Official Territory except in less-than-carload lots (leather)

1 moves on class rates which the Commission has specifically recently found lawful (electric appliances)

2 do not move into Official Territory because of the sufficiency of local demand (lead products and iron and steel tanks).

The evidence of injury, therefore, depends upon the testimony concerning

1. The washboard manufacturer who is able to sell washboards within commuting distance of his principal competitor's factory and has increased his business substantially;
2. The calendar manufacturer who lost the 1943 contract but obtained a 1944 contract from the same customer;
3. The automobile truck body manufacturer who is able to sell f. o. b. his plant; and
4. The would-be shell box manufacturer in Nashville.

The evidence with respect to the injury to Western shipping interests is aptly summarized by the late Commissioner Porter, in his dissenting opinion. As is there pointed out,

> "The western interests offered only three shipper witnesses, a steel manufacturer at Pueblo, Colo., who

uses class rates to a very limited extent and did not advocate rate parity with Official Territory, a manufacturer of coal-washing machinery at Pittsburg, Kans., and a manufacturer of lamps and stoves at Wichita, Kans. The last two now ship most of their products to official territory, and neither left any impression that he was hurt by the present adjustment." (Rep. 720-1, R. 335-6)

The testimony of shipper witnesses and the Commission's findings with regard thereto, it is submitted, whether considered individually or collectively, cannot be said to evidence the slightest injury resulting from differences between class rates within and into Official Territory.

Equally untenable is the second claimed basis for a finding of injury, advanced by Southern interests, namely, that differences between class rates within and class rates into Official Territory have resulted in the retarding of Southern industrial development. Both the contention that differences between such class rates has affected Southern industrial development and the contention that Southern industrial development has been retarded are wholly without support in the evidence and are negatived by the Commission's subsidiary findings.

Certainly differences between class rates on interterritorial traffic into Official Territory and class rates within Official Territory cannot be found to have served as a deterrent to Southern shippers or potential shippers. The Commission has found, on the basis of a traffic count made by Dr. Aitchison for May 27 and September 23, 1942, that the South on those days was moving two-thirds as many cars consigned to Official Territory as it was moving cars intraterritorially. (Rep. 565, R. 180) Moreover, as the Commission finds, the rates available to the traffic moving into Official Territory were, in many instances, either lower than Official Territory rates (Rep. 601, R. 216) or on substantially the same level. (Rep. 602-3, R. 217-8)

Nor is there any evidence that the growth and development of industry within the South has been retarded, either by differences in class rates or by any other circumstance. As the late Commissioner Porter stated, in this regard,

> ". . . it is urged by the southern interests, and especially in behalf of the Southern Governors' Conference, that the industrial development of the South as a whole has been and will continue to be retarded, and therefore that the South as a territory has been and will continue to be injured, by the class-rate adjustment unless class-rate uniformity is brought about. The evidence is overwhelmingly to the contrary. The facts are that from 1929 to 1939, which is a representative period, the South made greater progress industrially and economically than any other section of the country . ." (Rep. 721, R. 336)

The statistical data set forth at pages 621 and 622 of the Commission's report (R. 236-237), evidencing the far greater industrial and economic progress made by the South, both generally and in respect of particular industries fully substantiates Commissioner Porter's position. After referring to these data in the majority report, Commissioner Porter continued,

> "Similar data of record show like trends in the furniture industry, in the manufacture of heating and cooking apparatus, and in other industries. Only in the manufacture of a relatively few products, such as morticians' goods, certain flavoring extracts and sirups, and flour and grain-mill products, was industrial trend during that period less favorable in the South than in the North. From 1930 to 1940 there was a greater decrease in agricultural employment in southern than in official territory, but manufacturing employment increased in the South and decreased in the North. In 1941, income payments for the United States were 111 percent of those in 1929, for official territory 100 percent, and for the South 128 percent." (Rep. 721, R. 336)

In view of the evidence and the subsidiary findings of the Commission with respect to injury, it is clear that the Commission's ultimate finding of undue preference and prejudice cannot be sustained.

(c) *The record does not warrant, and the Commission's subsidiary findings preclude, a finding that differences in transportation conditions do not justify differences between class rates within and class rates into Official Territory.*

While the Commission's ad interim order does not itself prescribe complete uniformity of class rates, it is important to remember that the Commission has based its ad interim order upon an ultimate finding that class rates within Official Territory, on the one hand, and class rates into Official Territory, on the other hand, are unduly preferential and prejudicial to the extent that *such rates are not uniform*. The Commission's ad interim order, as the Commission makes clear, does not purport to *eliminate* the preference and prejudice allegedly found but only to *reduce* that "unlawfulness" until such time as it can be wholly eliminated, as the Commission says, by the establishment of a uniform classification and the uniform rate scale which is set forth in Appendix 10 to the report. *The finding of unlawfulness is a finding that no departure from uniformity is justified.* (Rep. 701, R. 316) Such finding to be valid therefore must be based upon subsidiary findings to the effect that conditions affecting the two types of transportation service are not materially different.

Examined in the light of these considerations, it is obvious that the Commission's finding of violation cannot be sustained. The record does not contain evidence to warrant a finding that nonuniformity is unjustified, and the subsidiary findings of the Commission clearly will not permit such a finding. It is true, of course, that class rates into Official Territory (reflecting usually a blending of the origin terri-

tory rate level with the Official Territory level) are generally somewhat higher than class rates on traffic moving wholly within Official Territory. *But, the Commission itself has found that transportation costs are lower in Official Territory than in Southern Territory, and substantially lower in Official Territory than in Western Territory, from which it must be obvious that justification exists for a generally lower level of rates in Official Territory than from other territories into Official Territory.* The Commission has also found that Official Territory has, by far, the greatest preponderance of well-paying traffic, from which it follows that Official Territory rates on such traffic (generally class rates) may be lower than in any other territory, and lower than interterritorial class rates blending Official Territory and other rate levels.

Cost Differences

The fact that transportation costs are lower in Official Territory than in any of the other major rate territories affords the first important justification for the establishment and maintenance of nonuniform territorial rates, that is, of *lower rates generally* for Official Territory intraterritorial movement than for interterritorial movement into Official Territory.

That transportation costs are lower, and materially lower, in Official Territory than in any of the other major rate territories has repeatedly been recognized by the Commission in the past and is re-affirmed by findings based upon evidence, credited by the Commission, including the Edwards Cost Studies. *This evidence shows that Southern Territory costs are more than 6%, and that Western Territory costs are more than 15%, higher than Official Territory costs.* These differences are reflected in the table, appearing on Page 579 of the Commission's Report, (R. 194) wherein are set forth Dr. Edwards' territorial comparisons of costs for traffic moving 100, 300 and 500 miles in all

classes of equipment, and reflecting actual average loads. The following table reflects the cost figures for 300-mile hauls in the three major rate territories:

Territory	*U. S. Costs —100*	*Official Territory Costs—100*
Official Territory	95	100
Southern Territory	101	106.2
Western Territory	110	115.8

To cover their higher costs the southern and western carriers are entitled to assess higher rates (including class rates) against freight moving within their territories than the Official Territory level of rates (including class rates); they are justified in assessing such higher charges against the freight which they originate for movement into Official Territory; and the Official Territory carriers are justified in joining in interterritorial class rates which reflect higher charges for the portion of the haul in Southern or Western Territory, as the case may be. Nonuniformity of class rates is plainly justified.

The Commission, in its attempt to construct a basis for the prescription of uniform class rates, has attempted to minimize the differences, between territories, in the cost of rendering transportation service. To achieve this result it has dealt, at considerable length, (Rep. 578-581, R. 193-196) with cost evidence which is irrelevant because based upon the arbitrary exclusion of the so-called Pocahontas lines from Official Territory. If the Pocahontas lines' revenues and expenses are excluded from Official Territory cost data, the resultant "Official Territory" costs can be shown to be approximately equal to Southern costs. Nothing could be more arbitrary and capricious, however, than a comparison based upon such exclusion. The Pocahontas lines are Official Territory carriers; they serve within Official Territory, maintain Official Territory rates, compete with other Official Territory carriers, and would be required, unless

the Commissioner's minimum rate order with respect to Official Territory rates is enjoined in this proceeding, to increase their class rates by 10%. To exclude Pocahontas costs from Official Territory costs is to lay the basis for a cost comparison so arbitrary and unrealistic as to be meaningless. It is this comparison and this comparison only, which supports the Commission's view that territorial differences in costs ought to be disregarded.

Southern Territory costs are at least 6% in excess of Official Territory costs, whereas the general freight rate level in the South is only 4% higher than the level in Official Territory. The Commission's capricious juggling of cost data to obtain a different and unrealistic result is wholly unwarranted.

No amount of cost data juggling can obscure the substantial spread between Official Territory and Western Territory costs, which difference justifies substantial nonuniformity of rates (including class rates) and renders a requirement of class rate uniformity wholly unwarranted.

Traffic Consist Differences

In view of the cost differences which exist as between territories and which are discussed in the next preceding section, it is obvious that, even if no other transportation condition existed to warrant differences in territorial class rate levels, differences in territorial costs would justify the maintenance of class rates in Official Territory on a somewhat lower level than in either Southern or Western Territories, and would also, therefore, justify the maintenance of class rates on a somewhat lower level for movement wholly within Official Territory than for movement partly in another territory and only partly in Official Territory.

A further and fully as important justification exists for the maintenance of lower class rates in Official Territory than in other territories, and this justification is based upon differences, as between territories, in the nature of the

traffic which is available to the carriers. These differences may be summarized by stating that the carriers in Official Territory have available to them a large actual, as well as relative, volume of highly remunerative freight, so called, which can afford to pay its own out-of-pocket costs of carriage and in addition contribute substantially to additional costs and profit, whereas the carriers in the other territories do not have this type of freight available in as large volume, actual or relative.

In all territories, considerable traffic moves upon rates which are very little more than compensatory, for the very understandable reason that such traffic would not or could not move at all by rail on higher rates. This traffic, while covering its direct costs, makes relatively little contribution to such items as overhead and return on investment, leaving these burdens primarily to other traffic which can and will move on more remunerative rates. Differences in the actual and relative volume of well-paying traffic available to the carriers have definite bearing upon the carriers' rates. It is elementary, for example, that carriers which can require 40% of their traffic to pay not only "its own way" but also the bulk of the indirect expense and profit of running the railroad, need not charge such high unit rates for the movement of that 40% as must carriers who must require only 20% of their traffic to bear the bulk of their overhead burden. While the figures used in the foregoing example are used for purposes of illustration only, the evidence credited by the Commission indicates clearly that the basic situation depicted in the illustration does in fact exist and that Official Territory carriers find it possible to secure their needed revenues by charging lower rates on their larger volumes of highly remunerative traffic, while the southern and western carriers are faced with the necessity of obtaining adequate revenues by charging high rates on a small, actual as well as relative, volume of highly remunerative traffic.

Manufactures and Miscellaneous traffic (which is the most important class rate traffic) and Products of Mines traffic are admittedly the most highly remunerative types of traffic and, as the Commission has found (Rep. 612, R. 227), both are even more remunerative to the Official Territory Carriers than to the carriers in Southern Territory, even though Official Territory rates are lower than Southern Territory rates. In the first place, these two commodity groups provide, throughout the United States as a whole, more than 80% of all revenues received by the carriers over and above their out-of-pocket costs even though they constitute only 72.2% of the total carload traffic (Rep. 612, R. 227). Moreover, these two types of traffic are more remunerative to the Official Territory carriers than to the Southern Territory carriers, notwithstanding the fact of higher Southern rates. Thus, as appears from the tables on Page 612 of the Commission's Report (R. 227), these two groups which, combined, account for 82.4% of Official Territory revenue net ton-miles and only 70.4% of Southern Territory revenue net ton-miles, produce 88.5% of Official Territory revenues in excess of actual cost and only 71.4% of Southern Territory revenues in excess of costs.

A further circumstance which increases the rate burden which must be borne by class rate traffic in the South, particularly, is the fact that Products of Mines traffic in the South is not capable of contributing so substantially to gross revenues as it contributes in Official Territory. Products of Mines traffic which, in Official Territory, is highly remunerative and accounts for 38% of all revenues in excess of out-of-pocket costs, is considerably less remunerative in the South, where it accounts for only 21.2% of such revenues. One of the consequences of this fact is that more than one-half of all revenues in excess of Southern costs must be obtained by the Southern carriers from the one-quarter of their traffic in the manufactures and miscellaneous group.

Subsidiary findings also establish, beyond question, that the Official Territory carriers have available to them greater volumes, actually as well as relatively, of this more highly remunerative traffic than do the carriers of either of the other territories. This fact is apparent from the findings contained on Pages 611 and 612 of the Commission's Report. (R. 226-7) Thus, from the table appearing on Page 611 of the Report, the following comparisons with respect to Manufactures and Miscellaneous and Products of Mines traffic are shown:

	Percentage of total tonnage	*Percentage of total revenues*
Official Territory	88.42%	77.99%
Southern Territory	73.60%	58.31%
Western District	66.02%	53.92%

Other data of record, which the majority of the Commission has chosen to ignore, are reviewed by the late Commissioner Porter in his vigorous dissenting opinion. While the Commissioner was not in agreement with the majority in its conclusions and findings in the Report, his statements with respect to the evidence merit careful attention. As Commissioner Porter pointed out, in this regard, at Page 712 et seq. of the Report (R. 327 et seq.),

> "In the proceedings wherein these (territorial) levels were recently prescribed, we recognized that the volume of high-grade traffic was much greater and the articles included therein of much higher value in official territory than in the other territories; and that the volume of other than class-rate traffic, excluding coal, in comparison with the total traffic, was much greater, and the articles included in the other traffic of lower grade, in the other territories than in official territory. Because of these differing conditions, and the further fact that relatively lower rates were maintained on raw materials and basic commodities within the other territories than in official, we prescribed higher class-rate levels in southern, south-western, and western trunk-line territories than in official territory.

"Since the decisions in which those prescriptions were made, the situation as to volume and kind of traffic transported in the various territories, has not changed, except in degree." (Rep. 712-3, R. 327-8)

After reviewing the evidence with respect to the much greater volume of manufactures and miscellaneous and products of mines traffic in Official Territory, the Commissioner continued,

"Two classes of traffic, namely, coal and coke and iron and steel articles, move in much greater volume, constitute a far greater proportion of the total tonnage of freight handled, and provide absolutely and relatively a much larger amount of revenue in official territory than in the South. In 1939, approximately 95 percent of the coal and coke production of the country originated east of the Mississippi River, divided, official territory, including the Pocahontas region, 82.23 percent and southern territory, 12.9 percent. Excluding New England, in which there is no coal production but which imports a vast quantity, and the Pocahontas region, the coal and coke tonnage originated in official territory was 46.19 percent of the United States total. Coal and coke traffic is more diffused and is more evenly shared by the major eastern railroads than by those in the South, where it is largely confined to four railroads, Louisville & Nashville, Southern, Illinois Central, and Clinchfield." (Rep. 713, R. 328)

and further,

"Official territory railroads handled 481 million tons of freight other than coal and coke in 1939, as compared with 143 million tons transported by southern railroads. Included in the former figure was a large volume of iron and steel traffic far in excess of the tonnage of like articles in southern territory." (Rep. 714, R. 329)

* * * * *

> "Thus, coal, coke, and iron and steel tonnage provide official territory railroads with large sources of revenue which are available only in small degree to southern railroads."

In concluding his discussion on this point, he stated,

> "From the foregoing it is plain that the consist of the traffic is vastly different in official territory than it is in either southern or western territory, and that the chief difference lies in the much larger proportion and volume of the high-grade and more remunerative traffic in official than in either of the other territories.
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> • • • • •
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> "These important facts mean that the eastern roads by reason of their large volume of the more profitable traffic can render adequate service to the public with a lower rate level on other traffic, such as class-rate traffic, than can the southern and western roads." (Rep. 716, R. 331)

The Commission's subsidiary findings that cost differences (while they exist) do not wholly justify lower Official Territory rates and that consist differences (while they exist) do not wholly justify such lower rates do not provide a basis for disputing what is the fact, namely, that cost and consist differences combined *do* justify important class rate differences, and *such subsidiary findings obviously preclude a finding that no rate differences are justified by transportation conditions:*

2. *The Commission's order, which fails to provide the carriers with alternative methods of removal of preferences and prejudice, would be invalid as a remedy for a Section 3 violation even if such violation had been shown to exist.*

Even if the Commission's ultimate finding of a Section 3 violation could be sustained (which it cannot), the Com-

mission's ad interim order could not be sustained as a proper order to remedy such violation. An order to correct a preferential and prejudicial relationship must permit the carriers alternative methods of removing the discrimination unless, of course, there is only one lawful way in which the result can be achieved. The reason for this is that Section 3 of the Act is concerned with the relationship between rates, and with nothing else. If the relationship between two rates is unlawful, the Commission is empowered to order that relationship corrected. It is not empowered to prescribe the method by which the relationship shall be corrected, unless, of course, there is but one lawful method of correction. As this Court expressly said in *Texas and Pacific Railway Co.* v. *United States* (supra), in holding invalid the Commission's order

> " . . . Where an order is made under section 3 an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both. (Citing cases) The situation must be such that the carrier or carriers if given an option have an actual alternative." (P. 650)

It is true that the Court referred in said case to the Commission's order as an order under Section 3, but the order obviously would not have been valid (although the contrary has been suggested) if the Commission on the same findings and for the same alleged illegality had stated that its order was entered under Section 15(1) of the Act. The Court was not concerned with the formal issue of whether the Commission in entering its order had referred to the wrong section as the source of its authority, but rather with the substantive issue of whether, when the illegality was in the relationship of rates, the Commission *could* order anything more than a change in the relationship, various means of effecting such change being possible and lawful. The plain meaning of the decision in the *Texas and Pacific* case is that when the Commission properly finds

that illegality arises from a rate relationship, it may order that the relationship be corrected but may not require the establishment of a particular rate unless the correction of the relationship may lawfully be made only by the establishment of such rate and it is to this latter possibility that the Court's reference to Section 15(1) relates (289 U.S., fn. 39, p. 650). If various lawful possibilities of correction exist, the carriers must be left free to determine the manner of correction in accordance with their managerial discretion. It is no answer to say that this rule does not apply in cases where the Commission also finds the lower rate unreasonable in violation of Section 1, for as is hereinbefore pointed out, the Commission has not made a valid finding to that effect in this case.

The District Court erred in its application of the law in this regard, holding that because the Commission's order was entered under Section 15(1) of the Act, and not Section 3, an alternative need not be afforded. (R. 1438) The Court apparently accepted the argument of counsel for the United States and the Commission that Section 15(1) must be interpreted literally, and that this Court's opinion in the *Texas & Pacific* case was to be disregarded.

Inasmuch as these contentions will undoubtedly be made again, before this Court, careful consideration of them is warranted.

The contention that Section 15(1)* should be interpreted literally proves too much and leads to obviously absurd conclusions. In Section 15(1) it is provided that if "the Commission shall be of opinion that any . . . rate, fare OR charge . . . OR classification, regulation OR practice . . . is or will be" (a) unjust or unreasonable, OR (b) unjustly discriminatory, OR (c) unduly preferential or prejudicial, OR (d) otherwise in violation of any of the provisions of the Act, the Commission may prescribe (a) the just and reasonable rate, fare or charge to be observed in such case, or the

*The full text of the Section appears in the appendix hereto.

maximum or minimum or maximum and minimum, AND (b) the just, fair, and reasonable classification, regulation or practice to be followed, AND (c) order the carrier to cease and desist from violation, and not to collect rates, fares, and charges or maintain classifications, regulations or practices other than those prescribed. It will be noted that, while the types of unlawfulness are stated *disjunctively*, the available remedies are stated *conjunctively*. If section 15(1) is to be interpreted literally, as is contended for and if, accordingly, the Commission is to have the right to prescribe rates in a case where its only finding of unlawfulness is as to a rate relationship, then the Commission should by the same literal interpretation be deemed authorized, upon finding a tariff regulation unlawful, to prescribe not only a different regulation but a different rate. A literal interpretation of Section 15(1) would mean that if the Commission were to find, for example, that a particular carrier maintains an unjust and unreasonable tariff regulation affecting the manner of packing household furniture for transportation between New York and Chicago in violation of Section 1(6) of the Act, the Commission would be empowered not only to correct the specific violation by prescribing a just, fair and reasonable regulation, but might also, and in addition, prescribe a new rate for household goods between New York and Chicago (provided only that the rate be just and reasonable) and might order the carrier to cease and desist from publishing or collecting any other rate than that prescribed. Of course, such a result would be absurd, as those who contend for a literal interpretation of Section 15(1) would agree.

Section 15(1) must be interpreted in the light of the firmly established regulatory principle with respect to the managerial discretion of the carriers stated by this Court in

Interstate Commerce Commission v. *Chicago Great Western Railway*, 209 U. S. 108 as follows:

> " 'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and *generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.*' " (pp. 118-9) (Emphasis supplied)

The history of the exercise of the Commission's regulatory authority has been characterized by the fundamental recognition on the part of the courts that, in the absence of unlawfulness, the carriers are free to adjust their charges in accordance with the discretion of their managers and that, accordingly, the Commission, upon a finding of unlawfulness, may only enter such orders as are *necessary* to correct the unlawfulness, unless Congress has *specifically* authorized it to do more. Thus when the Commission has sought to invoke powers which were neither necessary nor expressly granted, but which the Commission has believed would be convenient, and has accordingly found 'implied' in the terms of the Act, the exercise of such powers has been annulled by this Court. One of the earliest such instances occurred in *Interstate Commerce Commission* v. *Railway Co.*, 167 U. S. 479 (1897) wherein the Commission had sought to infer, from its power "to execute and enforce the Act", the power to prescribe rates, and wherein the Court said:

> "The vice of this argument is that it is building up indirectly and by implication a power which is not in

> terms granted . . . if it (Congress) had intended to grant the power to establish rates, it would have said so in unmistakable terms." (P. 509)

An examination of the nature of the wrong of undue preference and the terms of Section 15(1) in the light of the Act as a whole shows clearly that the power to order the removal of undue preference and prejudice *in a particular manner* is not a necessary power, and that it has not been specifically granted to the Commission. In the first place, the Commission, in order effectively to remove discrimination or undue preference and prejudice, *need not do more than* order the discrimination removed. The wrong arises only from the relationship of the two or more rates, and as this Court said in the *Texas and Pacific* case,

> "The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both." (P. 650)

Secondly, it is clear that Congress has not specifically granted the Commission power to remove undue preference and prejudice by prescribing specific rates. As has hereinbefore been pointed out, the only interpretation of Section 15(1) which is consistent with such a grant leads to the absurd proposition that, once the Commission has found any type of unlawfulness, the Commission may immediately take over virtually all rate making and tariff functions of the carriers.

An examination of other provisions of the Act shows conclusively that Congress did not, and did not intend to, invest the Commission with power under Section 15(1) to prescribe a specific manner of removal of discrimination unless only one method of removal were possible and lawful. Section 13(4) of the Act contains the type of language which Congress would have used had it intended such a result.

In that section, the Commission is authorized, if it finds that intrastate rates discriminate against interstate commerce, to

> "prescribe the (intrastate) rate, fare or charge or the maximum or minimum, or maximum and minimum, thereafter to be charged . . . in such manner as, *in its judgment,* will remove such advantage, preference, prejudice or discrimination." (Emphasis supplied)

Section 13(4) thus contains a grant, in unmistakable terms, of the power to remove discrimination in a specific manner, and its language is to be contrasted with the wholly different language of Section 15(1). It is further significant that the provisions of Section 13(4) and the amendments to 15(1) relied upon by the Commission *were both contained in the same act, the Transportation Act of* 1920. *When Congress intended the Commission to assume the function of determining how prejudice should be removed, it knew how to make clear its intent.*

There is no incongruity in the Commission's having power to order specific changes in discriminatory intrastate rates (notwithstanding the State's sovereign rights) and yet being without power to order specific changes in interstate rates which result in undue preference and prejudice. Any claimed incongruity in this situation is illusory and unreal. In order to deal at all effectively with intrastate rates which discriminate, the Commission must have power to order specific increases or decreases in such rates, for it does not have comprehensive coercive power over intrastate rates and it is the existence of this comprehensive coercive power over the interstate carriers and interstate rates which permits the Commission to deal effectively with discriminatory interstate rates merely by ordering the carriers to remove the discrimination. State sovereignty is encroached upon far less by the Commission's being given the single specific power to increase discriminatory intrastate rates than it would be, were the Commission to be given the comprehen-

sive control of intrastate rates which (without such specific power) it would need in order to deal effectively with intrastate-interstate discrimination.

The fact that the power to prescribe the manner of removal of undue preference and prejudice is not necessary to correct the relationship and has not been expressly conferred upon the Commission by Section 15(1) properly construed, indicates clearly that, in stating in the *Texas & Pacific* case that,

> "Assuming that neither rate is unreasonable, the one carrier cannot be compelled to alter its rate because the other's is higher or lower for the same service . . . Where an order is made under Section 3 an alternative must be afforded." (P. 650)

this Court recognized that the power to order the specific method of removal of discrimination is neither an essential power nor a specifically granted power of the Commission and that, therefore, the carriers are entitled, in the exercise of their managerial discretion, to determine the method of correction of any Section 3 violation which the Commission finds as long as lawful alternatives exist.

The District Court's apparent belief that the aforequoted language from this Court's decision in the *Texas & Pacific* case is applicable only to orders under Section 3 to correct a Section 3 violation and not to orders entered under Section 15(1) to correct a Section 3 violation (R. 1438) is plainly wrong, and for several reasons. The first such reason is that literally an order cannot be entered under Section 3, for that section merely forbids discrimination. It does not authorize Commission action. The terms —a section 3 order—and—an order under Section 3—are common, however, and mean orders entered under Section 15(1) to correct violations of Section 3. This Court was speaking of such an order in the *Texas & Pacific* case and both the majority and minority opinions so state. Thus, in

the majority opinion, at page 634, Mr. Justice Roberts refers to the Court's prior order restoring the cause to the docket for reargument and directing counsel's attention to specific questions of undue preference and prejudice "within the sense and meaning of Sections 3(1) *and* 15(1) of the interstate commerce act . . ."* Mr. Justice Stone begins his dissenting opinion as follows:

> "The Interstate Commerce Commission, acting under Section 3(1) and Section 15(1) of the Interstate Commerce Act . . . has found", etc.

The statements thus quoted also defeat any possible claim that the language in the *Texas & Pacific* decision is applicable only to cease and desist orders entered under Section 12 of the Act.

POINT THREE

THE DISTRICT COURT ERRED IN DISMISSING THE PETITION OF THE PLAINTIFFS BELOW, AND IN REFUSING TO ISSUE AN ORDER PERMANENTLY ENJOINING ENFORCEMENT OF THE COMMISSON'S AD INTERIM ORDER.

The Commission's order, which appellants sought and seek to have enjoined, set aside and forever annulled, does not represent the lawful exercise of lawful authority by the

*The complete text of said order, as set forth in footnote 10 to the Court's opinion is as follows:

> "This cause is restored to the docket for reargument upon all questions involved, and the attention of counsel is invited to the question whether the respective relations of the Louisiana ports and the Texas ports to the export, import, and coastwise traffic affected, and to the rates condemned, by the orders in controversy are such that the Louisiana ports may be regarded as localities unduly or unreasonably preferred by such rates within the sense and meaning of sections 3(1) and 15(1) of the interstate commerce act and that the Texas ports may be regarded as localities unduly or unreasonably prejudiced by such rates within the sense and meaning of the same sections." Journal, October Term, 1931, P. 342.

Commission, but constitutes rather one phase of a social and economic experiment upon which the Commission has embarked under the imagined pressure of misinterpreted Congressional legislation (see pages 52 to 53 hereof). The late Commissioner Porter virtually so pointed out, in a preface to his vigorous dissenting opinion, stating,

> "I am forced to dissent from the majority report, first, because of its one-sided and inadequate statement of a number of the important facts; second, because the class-rate uniformity called for by the findings of the majority, . . . and the manner in which it is to be accomplished, not only are without adequate support upon the record and ignore the standards of rate-making consistently followed by this Commission throughout its 58-year history, but in my opinion ignore and are contrary to the best interests of the shipping public, as well as of the railroads, in each of the territories affected . . . ;" (Rep. 709, R. 324)

The cost of the experiment will be borne, if the Commission's order is permitted to become effective, almost entirely by the shippers and receivers of freight in Official Territory. As has hereinbefore been pointed out, Official Territory class rates will, if the ad interim order of the Commission is sustained, and the Commission's Ex Parte 162 order is not modified, be authorized to be increased 37½% over their 1945 levels. Class rates are of far greater importance in Official Territory, both relatively and actually, than in either Southern Territory or Western Territory, and both the District Court and the Commission have so found. (Rep. 638, R. 253; Rep. 565-6, R. 180-1; R. 808, 1451) Not only does a much larger proportion of the total traffic move on class rates in Official Territory than moves on class rates in either the South or the West but because the total volume of traffic in Official Territory far exceeds the total volume of traffic in either Southern Territory or Western Territory, the actual volume of class rate traffic in Official Territory far exceeds the actual volume of traffic

moving on such rates in either the South or the West. The shippers and receivers of freight in Official Territory will be required to pay the aforementioned greatly increased freight charges to the Official Territory carriers. These carriers in turn will either become the beneficiaries of increased rates which are higher than they sought, or will, as is more likely, be required to pay substantial portions of their increased revenues to the Southern and Western carriers in the form of divisions of joint rates for interterritorial movement. The class rate reductions which the Commission has ordered in the South and West to complete its uniformity experiment cannot fail to reduce the revenues of the carriers serving in those territories, and, when the Commission becomes faced with the problem of determining a fair basis for dividing interterritorial revenues between the participating carriers, it will find that the Act requires it to consider, among other things,

> "... the efficiency with which the carriers concerned are operated, *the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property* held for and used in the service of transportation ... *and any other fact or circumstance* which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge." (Sec. 15(6))

There is no escape from the conclusion that Official Territory shippers and receivers of freight will be required to underwrite and subsidize the uniformity experiment which the Commission has so unlawfully decreed shall be performed. The late Commissioner Porter so pointed out in his dissenting opinion (Rep. 716, R. 331)

Where an order of the Commission is made which is so arbitrary and so transcendent of the Commission's lawful authority as the Commission's minimum rate order here under attack, and where such an order will assuredly result

in heavy additional costs to Northern shippers, which additional costs are clearly unwarranted, this Court should exhibit no hesitancy in effectively preventing its illegal enforcement. This Court should reverse the order of the District Court and remand the proceeding with instructions to that Court to issue a permanent injunction.

Respectfully submitted,

HENRY E. FOLEY

Counsel for

THE HONORABLE HORACE A. HILDRETH,
Governor of the State of Maine

THE HONORABLE CHARLES M. DALE,
Governor of the State of New Hampshire

THE HONORABLE ERNEST W. GIBSON,
Governor of the State of Vermont

THE HONORABLE ROBERT F. BRADFORD,
Governor of the Commonwealth of Massachusetts

THE HONORABLE JOHN O. PASTORE,
Governor of the State of Rhode Island

THE HONORABLE JAMES L. MCCONAUGHY,
Governor of the State of Connecticut

APPENDIX

Conclusions, Findings and Order of the Interstate Commerce Commission in Ex Parte 162

Conclusions

We therefore pass to our ultimate findings and conclusions. Before stating them, we think the following observations should be made.

There are here involved all the freight rates and charges, and all the passenger fares of the railroads and many other carriers of the Nation, large and small. What we do will directly affect production and distribution in the industries of the Nation, and the welfare of its various regions, as well as the transportation industry. It will have its effect upon the forces tending to economic stabilization or the reverse. We have accorded every reasonable opportunity for those in any way affected to be heard, while pressing the proceedings with as much speed as the size and complexity in detail of the proposals permitted. No case has ever received from us more earnest study. What was said in dealing with another difficult problem of great importance may be repeated here (*Consolidation of Railroads*, 159 I. C. C. 522, at page 524):

"In a matter of this magnitude in scope and complexity in detail, even after the most careful study and the fullest and freest interchange of views by those charged with the duty of preparing this plan, there must remain many differences of opinion as to the several components parts, both large and small, comprised in the final result. Such is here the case. While a clear majority of us, although not always the same majority, have agreed as to each part of the plan proposed, not all of us have agreed as to all its parts, but all concur in the result. * * *"

When, in 1920, shortly after the close of federal control of the railroads, we were dealing with a situation in many

ways comparable with that now presented, the late Commissioner Eastman in concurring in our authorization of large increases in freight rates and passenger fares, made certain observations which are forceful here. He said in part (*Increased Rates, 1920*, 58 I. C. C. 220, at page 258):

"Summing the matter up, conditions are critical and they have not been made less so by the transition from federal to private control. The evil of poor service we have with us, and it is certain that the health of the nation will suffer seriously unless this evil is cured. It is my best judgment that the railroads cannot function successfully without materially increased rates, and I am also persuaded that it is in the best interest of the country that the present plan of operations should receive without delay the best test that can be given it. Under all the circumstances, it follows that it would be a mistake if the railroads were now accorded rates designed to produce substantially less revenue than their responsible executives with unanimity assert that they need in order that good service may be provided. What revenue will actually be produced no one can tell. If the rates prove unduly high, they may later be reduced. The present proceeding has nothing of finality about it and in many respects is similar to a suspension case, where the question is whether or not certain proposed rates shall be permitted to take effect without suspension, a matter left by the act to the discretion of the Commission."

Findings

From a consideration of the entire record in these proceedings, we conclude and find:

1. It is requisite for the carrying out of the purposes of the national transportation policy, and the development, coordination, and preservation of a national transportation system adequate to meet the needs of commerce, the postal

service, and the national defense, and in order that freight rates and charges shall be such as to move the greatest volume of traffic, while providing adequate and efficient transportation at the lowest cost consistent with the furnishing of such service, and to enable the petitioning carriers by railroad and by water under honest, economical, and efficient management to provide such service, that there be substantial increases in the basic freight rates and charges of the petitioners, and the continued maintenance of the present temporarily increased basis of passenger fares and charges. That the basic freight rates and charges, and passenger fares and charges, increased or authorized to be continued in the manner and to the extent herein found and approved in detail, will be just and reasonable, but that the full amount of the increases in the form proposed in the petition in Ex Parte No. 162 have not been shown to be just and reasonable, in respects not herein approved.

2. Except as otherwise specifically provided in these findings or in the appendix thereto, all basic freight rates and charges of the petitioning rail and water carriers justly and reasonably may be increased for the future by 20 per cent. By basic freight rates and charges are meant those now in effect, whether established by order of the Commission or voluntary act of the petitioning carriers (including rates held under investigation and suspension orders)—excluding, however, from such freight rates and charges as now in effect such portion thereof as represents the interim increases authorized by the report and order entered herein on June 20, 1946. Basic freight rates and charges include also rates prescribed by outstanding orders of the Commission, when and as the rates therein prescribed become effective, subject to any exceptions specifically noted herein.

3. The basic freight rates and charges on the commodities specified in appendix 1 may be increased by the specific

percentages or amounts shown therein, and such rates increased as provided therein, will be just and reasonable for the future.

4. The following increases in the basic freight rates and charges for miscellaneous services will be just and reasonable for the future:

Rates and charges on milk and cream in passenger and freight service, including all commodities listed in the applicable basic milk and cream tariffs, may be increased 15 per cent.

Rates and charges for protective services published in Perishable Protective Tariff No. 14, Agent Quinn's I. C. C. No. 25, may be increased 15 per cent.

Charges for collection-on-delivery services may be increased 25 per cent.

Rates and charges for switching, including intraplant and intraterminal switching, whether or not absorbed by line-haul carriers, may be increased 25 per cent.

Where tariffs provide for absorption of charges for switching, subject to a stated minimum revenue for a line-haul carrier, such stated minimum may be increased by the same amount as the charge or charges for switching.

Charges for loading or unloading provided in section 2 of Consolidated Classification Rule 15 may be increased to 5 cents per 100 pounds.

Rates and charges for special train, trap- and ferry-car, and crane service, and for handling railway equipment on its own wheels, may be increased 25 per cent.

All commodity freight rates, and rates and charges on freight in truck bodies, may be increased 25 per cent.

Rates and charges for handling commodities (except milk and cream) in baggage or passenger-train service, including excess baggage but excluding corpses, may be increased 25 per cent.

Except as otherwise herein specifically provided, an increase of 25 per cent may be made in the basic rates and charges for accessorial and terminal services such as storage, handling, loading, unloading, reconsignment, diversion, fabrication, other transits, weighing, etc., other than (a) demurrage charges, on which no increase is here authorized, and (b) charges for handling, loading, or unloading export, import, coastwise, or intercoastal traffic which do not affect the measure of the line-haul rate and are not in addition to the line-haul rate, on which there will be no increase.

Terminal railroads may increase their charges to the railroads for performing the loading and unloading of livestock at public stockyards, by 15 per cent, and such increased charges should be absorbed, or otherwise paid, by the railroads performing the line-haul transportation, except when they accrue for unloading or reloading en route at the request of the shipper, consignee, or owner, or to try an intermediate market, or to comply with quarantine regulations.

Minimum charges per shipment may be increased to $1, except on single shipments of milk and cream. Minimum charges per car in line-haul service, as provided in Consolidated Classification Rule 13 and corresponding rules in other tariffs, may be increased to $20. Minimum line-haul rates where pick-up and delivery services are included may be increased to 50 cents, as provided in our interim findings.

Except as otherwise provided in appendix 1, rates on articles under the general commodity grouping of Manufactures and Miscellaneous, class rates and rates on less-than-carload and any-quantity traffic may be increased 25 per cent within official territory, as defined in our prior (interim) report at page 743, 20 per cent within and between other territories, and 22.5 per cent between official territory and points in other territories.

5. Where through rates are made by combining separately stated rates (two-factor or multiple-factor rates),

such combination will not be increased separately, except as otherwise provided as to rates on grain and grain products, but a single increase should be applied to the entire through rate.

6. Joint, international rates to and from Canada or Mexico may be increased to the same extent and in the same manner as is here authorized within the United States. Where rates on international traffic are made by the use of combinations on the international border, the factor within the United States to or from the international border may be increased to the same extent and in the same manner as is here authorized within the United States.

7. In the initial publication, rates applicable on import, export, coastwise, and intercoastal traffic may be increased to the same extent and in the same manner as provided for domestic rates. The findings herein as to reasonableness are predicated upon the assumption that after the increases become effective such rates will be revised promptly by specific publication to restore recognized port relationships, if such adjustment cannot be made simultaneously with publication of the increases.

8. In the initial publication rates with ocean, lake, and inland waterways carriers may be increased to the same extent and in the same manner as provided for all-rail rates. The findings herein as as to reasonableness are predicated upon the assumption that after the increases become effective, such rates will be revised promptly by specific publication to restore existing differentials in cents per 100 pounds or other unit, if such adjustment cannot be made simultaneously with publication of the increases.

9. The increases herein provided may be applied to joint rates with motor carriers to the same extent and in the same manner as is proposed for all-rail rates.

10. Fractions should be disposed of as follows: In connection with rates or charges which, without the emergency increases of July 1, 1946, are approximately 5 cents or lower, resolve fractions to the nearest quarter cent; rates higher than approximately 5 cents, but not higher than approximately 10 cents, resolve fractions to the nearest half cent; rates higher than approximately 10 cents, resolve fractions to the nearest whole cent, except on grain and grain products and articles taking the same rates; in all instances resolve fractions in connection with commodity rates to the nearest half cent. When, in connection with rates rounded out to quarter cents, fractions fall midway between two quarter cents, increase to the next higher quarter cent; and similarly in conection with rates rounded out to half and to whole cents.

11. The increase in passenger fares authorized by our order in Ex Parte No. 148, dated January 21, 1942, as modified by our order in Ex Parte No. 148, dated October 30, 1945, may be continued in effect without expiration date, and for the future will be just and reasonable.

12. Where carriers earn specific stated amounts as their compensation or division out of joint through rates, such amounts should be increased in the same percentages as the joint through rates.

13. When accessorial charges or switching charges are increased as herein authorized, and such charges prior to the increase were absorbed wholly or in part by a carrier, the amount of the absorption should be increased in the same proportion as the increase in the accessorial or switching charge.

14. The increases in freight rates and charges herein authorized shall supersede and be in lieu of the emergency increases authorized in our prior (interim) report and

order of June 20, 1946. The authorized increased rates and charges may be made effective in the period January 1, 1947, to February 28, 1947, upon not less than 5 days' notice to the Commission and to the general public, by filing and posting in the manner preseribed in the Interstate Commerce Act.

15. Rates and charges increased as herein permitted are not considered as prescribed rates, within the meaning of Arizona Grocery Co. v. Atchison T. & S. F. Ry. Co., 284 U. S. 370.

16. Rates, increased as authorized herein, within official territory from and to border points may be applied as a minimum on interterritorial traffic through such border points to the extent necessary to conform to the provisions of section 4 (1) of the act, in like manner as was authorized in our prior (interim) report.

17. The various railroads, other than the class I railroads, and water carriers which have become parties to this proceeding, will be authorized to make the same increases as the class I railroads. If this authorization does not dispose of the issues raised by their petitions, the matter may be called to our attention, provided any disputed matters prove to be incapable of adjustment informally.

18. Freight forwarders may increase their rates and charges simultaneously and ratably, or in direct proportion to analogous or corresponding increases made in the freight rates and charges of the common carriers whose facilities and transportation services they use. No order is considered necessary to enable them to publish and file such increased rates, subject to possible protest and suspension, other than under section 405 of the act. Appropriate orders will be entered under that section upon proper applications.

19. The record will be held open for the purpose of giving consideration to any necessary readjustments or corrections which the circumstances may warrant, if brought to our attention in the manner prescribed in our Rules of Practice. We will aid in the informal adjustment of any matters arising hereunder, if our aid shall be deemed helpful.

20. Appropriate orders for relief under sections 4(1), 6, 217, 306, and 405 of the Interstate Commerce Act will be entered; except as specified in the following sentence of this finding our outstanding orders will be modified accordingly. As the effectiveness of our order in Class Rate Investigation, 1939, docket No. 28300, is now stayed and enjoined, we do not hereby in any manner suspend or supersede, or modify or affect the finding and order entered in that proceeding.

Chairman Barnard and Commissioner Johnson did not participate in the disposition of this proceeding.

Appendix I

(Omitted in printing)

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 5th day of December, A. D. 1946.

Ex Parte No. 162, Increased Railway Rates, Fares, and *Charges, 1946; Ex Parte No. 148, Increased Railway Rates, Fares, and Charges, 1942:*

It appearing, That further supplemental petitions have been filed, further hearings have been held, and parties have been heard in oral argument and upon briefs filed October 25, 1946;

And it further appearing, That the Commission, on the date hereof, has made its report in these proceedings containing its findings of fact and conclusions thereon, which

said report, together with the reports heretofore made in these proceedings, are hereby referred to and made a part hereof;

It is ordered, That the increased freight rates and charges therein authorized shall supersede and be in lieu of the emergency increases authorized in the prior report of June 20, 1946. The authorized increased rates and charges may be made effective during the period from January 1, 1947, to February 28, 1947, upon not less than five days' notice to the Commission and to the general public, by filing and posting in the manner prescribed in the Interstate Commerce Act;

It is further ordered, That outstanding unexpired orders in other proceedings are hereby modified so as to permit the increases in freight rates and charges herein authorized to be established; provided, however, that the provisions of this paragraph shall not be construed to suspend or supersede or modify or affect the findings and order entered in *Class Rate Investigation, 1939,* Docket No. 28300, the operation of which is stayed by court order;

It is further ordered, That rates, increased as authorized herein, within official territory from and to border points, may be applied as a minimum on interterritorial traffic through such border points to the extent necessary to conform to the provisions of section 4(1) of the act, in like manner as was authorized in the prior report of June 20, 1946;

It is further ordered, That the authorization contained in the report and order of June 20, 1946, respecting increased rates on iron ore to the upper lake ports and increased handling charges on iron ore at those ports, is hereby canceled effective January 1, 1947;

It is further ordered, That the increase in passenger fares authorized by the order in Ex Parte No. 148, dated January 21, 1942, as modified by the order in Ex Parte No. 148, dated October 20, 1945, be, and it is hereby, continued in effect without expiration date;

And it is further ordered, That all tariffs or supplements changing rates or charges under the authority of this order, which rates or charges are now maintained or held in force by virtue of outstanding orders of the Commission, shall bear on their title pages specific reference to this order.

Fourth Section Order No. 15650

It appearing, That the Commission in its report in the above-entitled proceedings, hereby referred to and made a part hereof, has approved certain proposed increases for the transportation of property over the lines of rail and water carriers, parties to the proceedings, operating within the United States;

It further appearing, That the said increases as approved and authorized by the Commission in the above-entitled proceedings cannot be published and made effective in the manner authorized therein without producing in some instances rates or charges that yield greater compensation in the aggregate for the transportation of like kind of property for a shorter than for a longer distance over the same line or route in the same direction or greater compensation as a through rate than the aggregate of intermediate rates or charges subject to the Interstate Commerce Act, in contravention of the fourth section of said act;

It is ordered, That, until further order of the Commission, carriers subject to the Interstate Commerce Act parties to the proceedings be, and they are hereby, authorized to establish the increases so approved without observing the provisions of section 4 of the act; *Provided*, That (1) the authority contained herein to maintain rates in contravention of the aggregate-of-intermediates provision of section 4 shall expire July 1, 1947; and (2) where rates established under the authority contained herein are increased by relatively greater amounts to or from intermediate points than to or from more distant points, or where increases are made in rates to or from intermediate points and not to or from

more distant points, thereby creating or increasing departures from the long-and-short-haul provision of section 4 of the act, the relief herein shall expire July 1, 1947, except that if applications are filed on or before July 1, 1947, for relief to continue any of such rates beyond that date, the rates included in and covered by such applications may be continued until the determination thereof by this Commission.

It is further ordered, That in those instances in which rates in contravention of the provisions of section 4 are established under the authority contained herein the schedule or schedules containing such rates shall make reference to this order in the manner required by rule 28 of Tariff Circular No. 20.

Supplemental Fourth Section Order No. 14500

It appearing, That the Commission by its order this day entered in the above proceeding, which is hereby referred to and made a part hereof, has approved certain proposed increased fares for the transportation of passengers over the lines of carriers in the United States; and upon further consideration of fourth section order No. 14500, entered January 21, 1942, in *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, as amended by supplemental orders entered July 6, 1942, August 20, 1942, and September 9, 1942, granting relief from the long-and-short-haul and aggregate-of-intermediates provisions of section 4 of the interstate commerce act necessary to establish increased fares previously authorized in the proceeding:

It is ordered, That fourth section order No. 14500, entered and amended as aforestated, be, and it is hereby, further modified and amended so as to provide that the same measure of relief from the aggregate-of-intermediates and long-and-short-haul provisions of section 4 of the act as is authorized therein with respect to present fares and charges

shall also apply, subject to the same terms and conditions, to passenger fares and charges between the same points increased as authorized by order entered this day in the proceeding referred to above and made a part hereof.

By the Commission

W. P. BARTEL,
Secretary.

(SEAL)

INTERSTATE COMMERCE ACT, SECTION 15 (1)

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and mini-

mum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing brief upon counsel for the adverse parties in this proceeding by causing a copy thereof to be mailed, postage prepaid, to each of said counsel.

Dated this 8th day of February, 1947, at Boston, Massachusetts.

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